

THE ICC AT 25:
LESSONS LEARNT

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THE ICC AT 25: LESSONS LEARNT

EDITED BY
NÓRA BÉRES



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FOREWORD



25 years have passed since the Rome Statute of the International Criminal Court was adopted and green light was given to set up the very first permanent international criminal court. That was a milestone reached that the international community had been longing for decades: the idea of a neutral and universal international criminal tribunal had been on the agenda of progressive States as well as of the United Nations since the Nuremberg and Tokyo trials after the Second World War.

No wonder, the establishment of the International Criminal Court has been one of the most glorious achievements of the international community since the creation of the UN. The almost mythological mandate of the ICC, that is to put an end to impunity, has faced the Court with overwhelming challenges from the beginning of its existence. However, we should bear in mind that the ICC has an extremely important but not an exclusive role in international criminal justice. So as to enhance the optimal functioning and to accomplish the desired goal of the Court, the cooperation of other actors of international law and mechanisms are inevitably needed, such as *ad hoc* international criminal tribunals (e.g., the ICTY and the ICTR), hybrid tribunals (the SCSL, the STL etc.) or national proceedings initiated even on the basis of universal jurisdiction. Placing the ICC to its right place in the international legal order is beyond inevitable since the Court can only be fairly judged if it is not underestimated on the one hand but not hyped excessively on the other hand.

While one part of the challenges swirling constantly around the ICC is characteristic of any international criminal court or tribunal, such as peculiarities of evidentiary procedures, high expenditures of international criminal justice, moderate effects of the Court's functioning on peacekeeping and social consolidation, or the constant struggle with the shadow of politics, the International Criminal Court should also do well among hurdles being absolutely its own. The reasons of these specificities can be divided, with some oversimplification of course, into two groups. The first category is in connection with the way how the ICC was established, as it is the very first multilateral treaty-based and permanent international criminal court. As such, peculiarities of private law and the law of treaties pervade the whole framework of the Rome Statute and affects the dynamics of criminal proceedings before the Court. Meanwhile, criminal justice is a true manifestation of public law, i.e., exercising *ius puniendi* as an attribute of State sovereignty that can only be efficient when decisions of the courts with jurisdiction are genuinely enforced. The 'treaty-based roots', however, are not

able to bring to life the institutions of criminal law many times, which is the general reason for the problems of the ICC, describing any case before the Court.

The ancient Roman maxim says '*praetor ius facere non potest*', and this evergreen truth is also in line with the theory on the separation of powers thus it is worth applying when contemplating about the ICC. Although the mandate of international criminal judges does neither encompass legislative power still today, international courts and tribunals have a remarkable position when it comes to interpretation of the norms of international criminal law. It has become the 'fine art' of international judges to unfold the definitions and terms of international criminal law subtly and carefully, and in the case of the ICC, to bring to life the treaty-based provisions of the Rome Statute. It goes without saying that the latter challenges the ICC judges over and over again, nevertheless it must also be noted that there is no more suitable and more legitimate way under contemporary international law to create an international criminal court. That is the primary reason for focusing on judicial case law in the following chapters is a commonly applied method.

This book, like the academic conference organised under the auspices of the Central European Academy and the Ferenc Mádl Institute of Comparative Law in Budapest on 4–5 September 2023, marks the 25th anniversary of the adoption of the Rome Statute. According to its editorial concept, general and special challenges of the ICC are under due scrutiny starting from broader and more comprehensive problems towards rather peculiar issues. Throughout the chapters, historical antecedents of international criminal justice, the Court's place in the international legal order, jurisdiction and complementarity, core crimes (the crime of genocide, crimes against humanity, war crimes and the crime of aggression), and victims and witnesses participation in the proceedings are discussed in detail, while the functioning of the Court, the position of the Prosecutor, the aspects of the topic of children and international crimes, economic and environmental crimes, problems related to peacekeepers, the interplay between the ICC and other international courts, the relationship between the Court and Africa, and the issue of non-State actors and international criminal law are also analysed by the authors. The ultimate aim of this book is not to provide an exhaustive list on all the challenges the ICC has had but rather to highlight some of the most crucial problems the Court has faced during its more than two decades long functioning.

The Editor of this book would hereby like to take the opportunity to say thank you to the management of the Central European Academy and of the Ferenc Mádl Institute of Comparative Law for paying attention to the relevance of international criminal justice and for helping to demonstrate the perspectives of (mostly) Central European academics with publishing this long-awaited volume. Huge gratitude goes to all of the outstanding colleagues who participated in this project and contributed to the success of this book.

Miskolc, 31 December 2023

Nóra Béres
Editor

CHAPTER 1

“ISMS” OR THE INTERNATIONAL CRIMINAL COURT AND ITS PLACE IN THE INTERNATIONAL LEGAL ORDER: REVIEW OF A QUARTER CENTURY



PÉTER KOVÁCS

Abstract

This article provides an overview of the twenty-five-year existence of the International Criminal Court (ICC). The ICC has faced various challenges since its establishment. Some of these challenges were partly rooted in the work done in the final days of the Rome Diplomatic Conference, where a mutually acceptable text had to be forged on the basis of often conflicting textual proposals. Other challenges emerged with the changes in the political will of several states. The chambers of the ICC tried to establish a coherent jurisprudence able to cope with the eventual imperfections of the Rome Statute. While jurisprudential practice can help identify appropriate content for the complex formulas, which are sometimes the fruit of diplomatic ambiguity, political challenges are more difficult to overcome. Political actors cited concerns regarding “anti-Africanism”, lack of efficiency, and “politicisation”—critiques often intended to conceal a lack of genuine co-operation or even animosity towards independent international control. As this article shows, an important part of the legacy of the International Criminal Tribunal for the former Yugoslavia (ICTY) lies in the autonomous development of ICC jurisprudence and the specificities of common and continental law, as well as “criminal law” and “public international law”. The relevance of the ICC cannot be measured in the number of adjudicated cases

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and condemned perpetrators alone. The impact of the ICC on reparation and assistance to victims and the uniform interpretation of international criminal law at various law faculties and military academies cannot be overlooked.

Keywords: cases and situations, common law, complementarity, co-operation, continental law, human rights, ICC, ICTY, ICTR, international criminal law, international humanitarian law, jurisprudential coherence and reforms, Practice Manual, procedural guarantees, victim's reparation

1. Introduction and explanation of the chosen title

When the conference organisers asked me to prepare an introductory study, I thought a lot about how to present the twenty-five-year history of the International Criminal Court. Logically, such a presentation can be based on the dichotomy of challenges and results, but this is a well-worn approach in analyses. When I chose the term “isms” – the meaning of which is not immediately clear – I remembered the title of a book that I saw in the window of a bookshop when I was a child: *Az Izmusok Története* ('History of the Isms'),¹ written by the Hungarian poet, painter, and left-wing activist, Lajos Kassák,² a member of the *avant-garde* movement. In this book, Kassák presents an overview of the great movements of the late nineteenth and early twentieth centuries, including impressionism, cubism, fauvism, futurism, constructivism, and dadaism. Although I did not understand the title at that time, it fascinated me.

I hope that the late Kassák will pardon my borrowing this term from the title of his book to guide you through the twenty-five-year history of the International Criminal Court (ICC), framing it as a story where the main issues can be characterised by expressions ending in “ism”.³ I apologise to philosophers who use these expressions in other ways and to those who consider some of these “isms” as counter to the proper use of the English language.

1 Kassák, 1972.

2 https://en.wikipedia.org/wiki/Lajos_Kassák (Accessed: July 1, 2023).

3 Specifically, (1) Idealism vs. realism?; (2) Institutionalism (institution building, jurisprudence-building with “ICTY-ism” and “independentism”); (3) Parallelism (parallel use of common law and continental law approaches); (4) “Anti-Africanism” and ‘legal neo-colonialism’ (unsubstantiated charges and manipulative criticism); (5) “Out of Africanism” (reaction or logical consequences?); (6) Comparatism (or how to assess efficacy); (7) “Human rights” protectionism’ (to protect the rights of the accused and to protect victims and witnesses); (8) Humanism (participation of victims and assistance and reparation for victims); (9) Activism vs. textualism; (10) Criminal law centrism and international law centrism; (11) Co-operationism (cooperation with states, international organisations and entities, and NGOs); (12) Criticism (internal critics, external critics, friendly and unfriendly); (13) Adaptationism; and (14) Futurism or “long termism”?

2. The past twenty-five years through the prism of the “ism”

2.1. *Idealism vs. realism?*

The notion of a permanent international criminal tribunal was long dismissed as idealist fantasy. As a consequence of the fate of the plans submitted by Gustave Moynier,⁴ Vespasian Pella,⁵ and the Association Internationale de Droit Pénal,⁶ non-entry into force of two related conventions⁷ adopted under the auspices of the League of Nations in 1937, and failure to fulfil the promise stipulated in Article VI of the Convention on the Prevention and Punishment of the Crime of Genocide,⁸ the world considered that such a tribunal was a noble but unrealistic pursuit, and only of interest to incurable idealists.

In 1989, the idea of establishing an international criminal court gained credence. Indeed, the initiative submitted by Trinidad and Tobago, renewed confidence of the International Law Commission that their work would receive the necessary attention and action, and developments of the Rome Diplomatic Conference and preparatory inter-governmental expert meetings signalled a decisive shift—a realisation that the work would succeed and that idealism had prevailed.

Many governmental experts were working hard to establish an institution entrusted with the task of putting an end to impunity.

However, as the old saying goes, “the devil is in the details”.

Realism intertwined with “Realpolitik” did not disappear, significantly influencing the negotiations, including those on the triggering of the ICC’s jurisdictional competence, the role attributed to the United Nations Security Council (UNSC), and the definition of aggression. Nobody was shocked by P5 members insisting on the role of UNSC as the third pillar in the determination of the ICC’s jurisdictional competence, alongside *ratione loci* and *ratione personae* and in conjunction with the principle of *pacta tertiis nec nocent, nec pro sunt*.

The finalised form was vehemently criticised, raising concerns that (i) P5 members would never join the ICC and (ii) would not accept the prosecution of their nationals by the ICC, (iii) would do their best to send situations from Non-States Parties to the Prosecutor, and (iv) would prevent their allies from facing prosecution.

4 Moynier, 1872.

5 Pella, 1925.

6 Draft prepared by the International Association of Penal Law on adding a criminal chamber to the Permanent Court of International Justice (January 16, 1928).

7 Convention for the Prevention and Punishment of the Crime of Terrorism and Convention for the Creation of an International Criminal Court.

8 1948: Convention on the Prevention and Punishment of the Crime of Genocide: Article VI: Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

Practice has proved these assumptions to be partly correct. While France and the United Kingdom joined the ICC, they have yet to sign the 2010 Kampala amendment on the definition of the aggression. Meanwhile, although the United States and Russia signed the Rome Statute, they later withdrew their signatures. The UNSC referred only two situations to the ICC, namely, those concerning Sudan and Libya, while likely vetoing or threatening to veto the referral of at least two other situations. Despite being a Non-State Party, Russia co-operated with the ICC for a while, including the first part of the preliminary examination of the situation in Georgia. Under Democrat presidents Barack Obama and Joe Biden, the US co-operated with the ICC concerning situations in Africa, Myanmar, and Ukraine. Neither the US nor Russia accepted the prosecution of their nationals before the ICC (e.g. Afghanistan and Ukraine) and the media have largely covered the different steps taken. Meanwhile, although the UK, as a State Party, accepted the preliminary examinations concerning British soldiers serving in Iraq, ICC action ended with the recognition of complementarity in respect to the British investigation and internal procedures over their own soldiers.

2.2. Institutionalism (institution building, jurisprudence -building with “ICTY-ism”, and “independentism”)

As always happens when a new judicial institution is set up, the first years of the ICC were spent preparing and adopting the necessary normative documents, namely, Elements of Crimes (2002) and the Rules of Procedure and Evidence (2002), both of which are complementary to the Rome Statute (1998). While the Rome Statute was adopted at the Rome Diplomatic Conference, Elements of Crimes and RPE were adopted during the first session of the Assembly of States Parties (ASP) during the first session, a few weeks after the Rome Statute was entered into force.

The Regulations of the Court were adopted by the judges on 26 May 2004, Regulations of Registry was approved by the Presidency of the ICC on 6 March 2006, and the Regulations of the Office of the Prosecutor was entered into force on 23 April 2009, after its adoption by the Prosecutor. The Code of Professional Conduct for Counsel was adopted by the ASP on 2 December 2005. Some of these documents have undergone minor modifications since their entry into force.

Beside normative institution-building and its human staffing aspects, one of the main issues was whether and to what extent the experiences of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) would be beneficial to the ICC. Pervasive during the first decade, this “ICTY-ism” was due to (i) the vocational similarity of the institutions, (ii) the similarity in the statutory texts, (iii) the developed jurisprudence, and (iv) the arrival of qualified experts from the ICTY staff.

Meanwhile, “independentism” can be explained by (i) the consideration that there are substantial organic and textual differences between the courts. For example, the ICTY had no “Pre-Trial Chamber” and some forms of individual criminal liability were presented at the ICTY as being of customary law in character. In particular, in

the Rome Statute, Article 25(3)⁹ and Article 28¹⁰ regulate the issue of liability similarly to the Joint Criminal Enterprise (JCE), which has even more complicated and criticised variants (JCE I, JCE II, JCE III), but in precise written form. Moreover, war crimes are formulated in a more detailed manner in the Rome Statute, embracing crimes with no equivalent in the ICTY Statute, and so on. (ii) With the emergence of the ICC’s own jurisprudence, the jurisprudential reference to the ICTY and ICTR *dicta* is not necessarily inevitable. (iii) ICC judges and staff include diplomats and legal experts who were present at different stages of the preparation of the Rome Statute. Logically, their involvement in the negotiations and knowledge about the reasons for opting for a precise textual formula will influence their thoughts concerning the interpretation of a given disposition. (iv) The arrival of those who were not directly involved in either the ICTY or Rome Conference strengthened the need

9 Rome Statute, Article 25, Individual criminal responsibility:

3. *In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:*

(a) *Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;*

(b) *Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;*

(c) *For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;*

(d) *In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:*

(i) *Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or*

(ii) *Be made in the knowledge of the intention of the group to commit the crime.*

10 Rome Statute, Article 28, Responsibility of commanders and other superiors

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

1. *A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:*

(a) *That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and*

(b) *That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.*

2. *With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:*

(a) *The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;*

(b) *The crimes concerned activities that were within the effective responsibility and control of the superior; and*

(c) *The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.*

to develop a proper jurisprudence concerning cases that are factually different from those dealt with by the ICTY and ICTR.

2.3. *Parallelism (parallel use of common law and continental law approaches)*

The jurisprudential practice of the ICC is based on the parallel existence of the continental and common law approaches, although outside observers may get the impression that the latter prevails. During trials, “Objection” is often raised by the parties, and it is up to the presiding judge of the trial chamber to decide whether to sustain or overrule. Common law rules can also enter through the door opened by Article 21 (1)(c) via the general principles of law.¹¹ This occurred, albeit not without some hesitation, in the so-called “no case to answer” motion, which allows for the defence to stop the procedure as early as the “prosecution case” in the event of weakness of the Prosecutor’s evidence. Although the “no case to answer” motion was declared compatible¹² with the framework of the Rome Statute, the given chamber decides when and on what conditions it will admit such a submission.¹³

11 Rome Statute, Article 21, Applicable law:

1. *The Court shall apply:*

(a) *In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;*

(b) *In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;*

(c) *Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.*

12 ‘39. Finally, the Chamber considers it appropriate to note that the decision to, in principle, allow “no case to answer” motions is not intended to in any way pre-judge whether or not a motion of that kind should actually be pursued in this case. Bearing in mind that the purpose of permitting such motions is to promote the rights of an accused by providing a means to create a shorter, more focused and streamlined trial, the Defence should carefully consider—in light of the legal standard which will be applied, as specified above, and the evidence actually presented by the Prosecution at trial—whether or not a “no case to answer” motion is warranted in the circumstances. Such motions should not be pursued on a merely speculative basis or as a means of raising credibility challenges that are to be considered at the time of final deliberations. Nor should they be filed merely to shape the Chamber view as to the strength of the Prosecution case thus far presented’.

The Prosecutor v. Ruto and Sang, Decision No. 5 on the Conduct of Trial Proceedings (Principles and Procedure on ‘No Case to Answer’ Motions), ICC-01/09-01/11-1334 03-06-2014, https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2014_04595.PDF, (Accessed: July 1, 2023) § 39, p. 19.

13 ‘1. While the Court’s legal texts do not explicitly provide for a ‘no case to answer’ procedure in the trial proceedings before the Court, it nevertheless is permissible. A Trial Chamber may, in principle, decide to conduct or decline to conduct such a procedure in the exercise of its discretion.

2. *The discretion of the Trial Chamber as to whether or not to conduct a “no case to answer” procedure was not limited by internationally recognised human rights or as a result of the adoption of an adversarial trial structure’.*

Judgment on the appeal of Mr Bosco Ntaganda against the ‘Decision on Defence request for leave to file a “no case to answer” motion’, ICC-01/04-02/06-2026 05-09-2017, <https://www.icc-cpi.int/court-record/icc-01/04-02/06-2026>, Key findings, (Accessed: July 1, 2023), §§ 1, 2, p. 3.

See also: The Prosecutor v. Gbagbo and Blé Goudé, Judgment in the appeal of the Prosecutor against

Another impact of common law can be observed in the more liberal approach vis-à-vis the individual opinions of judges, inserted into a judgement at different points and not necessarily in a distinct work appended to a common text approved by clear majority.¹⁴

Regarding the presence of continental law, consider the role played by the presiding judge during a trial, which is much stronger than that of a “tennis umpire” type judge of the Anglo-Saxon world and has the right to question the witness directly, reformulate the parties’ questions, or reject their questions if they deem them repetitive or inappropriate (e.g. leading, insulting, or irrelevant). The institution of the pre-trial chamber and its attributes vis-à-vis the Prosecutor bears similarities to those of the *juge d’instruction*, albeit without direct investigative competences.

While the importance of jurisprudential “precedents” is a characteristic phenomenon of common law, it is present in the European constitutional jurisprudence of continental law countries.

The fact that the pertinence of a given piece of evidence may only be assessed in the judgement and not an interlocutory decision reflects similarities to the continental law approach. Incidentally, as the “may” in the foregoing sentence indicates, the opposite approach is also compatible with the Rome Statute and the Rules of Procedure and Evidence. The fact that evidence is formally submitted by parties is subject to the written decision of the given chamber.

In a trial, it is crucial (i) that the procedural issues not regulated in the Rules of Procedure and Evidence are clearly settled before the trial begins and (ii) that these “sub-rules” are observed throughout the trial. It goes without saying that the different trial chambers do not need to take a stance on whether to refer to the chosen rules and sub-rules of the trial as “common law” or of “continental law” rules.

Lastly, a number of the technical terms reflect common law terminology, including “calling party”, “pre-trial brief”, “appeal brief”, “prosecutor’s case”, and “defence’s case”, among others.

Trial Chamber I’s decision on the no case to answer motions, ICC-02/11-01/15-1400 01-04-2021, https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_03218.PDF, (Accessed: July 1, 2023) §§ 5–7, p. 9.

14 See: ‘202. [...] The Appeals Chamber finds that the arguments made as to possible disagreements between the two majority judges do not affect the legal requirement for “one decision.” This is because article 74(5) concerns a procedural formality in the requirement to issue one decision and does not relate to the substance of what is issued. The judges left no room for doubt in this case, stressing their full agreement with and support for the decision. The Appeals Chamber therefore rejects the Prosecutor’s argument that the requirement to provide one decision was breached because “Judge Henderson provided his own full and reasoned statement and made his own findings on the evidence while Judge Tarfusser only agreed in part, and afterwards, with his findings.”’

The prosecutor v. Gbagbo and Blé Goudé, judgment in the appeal of the prosecutor against Trial Chamber I’s decision on the no case to answer motions, (referred *supra*) § 202, p. 89.

2.4. “Anti-Africanism” and “legal neo-colonialism” (unsubstantiated charges and manipulative criticisms)

ICC practice¹⁵ has often been criticised for alleged bias, “anti-Africanism”, and “legal neo-colonialism”, among a number of similar labels invented and attached to it with the thinly veiled objective of discrediting it. Such critiques note that the first situations referred to the Court were in Africa, with people at the top of the given national constitutional hierarchy “targeted” by the Prosecutor. The first arrest warrant concerned Omar el Bashir,¹⁶ the president of Sudan at the time. This was followed by the investigation of the Kenyan situation linked with large-scale post-electoral violence, which led to charges against the new head of state, Uhuru Muigai Kenyatta,¹⁷ his deputy, William Samoei Ruto,¹⁸ and some of their close collaborators. In Côte d’Ivoire, the resigned head of state, Laurent Gbagbo,¹⁹ his spouse,²⁰ and one of his ministers²¹ were investigated, resulting in Gbagbo and his minister being transferred to The Hague, charged, and brought to trial. In the media, these cases were presented as a “proof” of alleged bias. The highly mediatised and manipulative image was reinforced by the fact that the indictees (or people under investigation) in other cases were also from Africa. (Indictees included, in alphabetical order, Al Hassan,²² Al Mahdi,²³ Bemba,²⁴ Gaddafi,²⁵ Katanga,²⁶ Lubanga,²⁷ Ngudjolo,²⁸ Ntaganda,²⁹ Ongwen,³⁰ Yekatom, and Ngaissona,³¹ among others.)

The consecutive repetition of the pure legal fact that nearly all of these “situations” were referred to the ICC by the governments of the concerned states themselves, with the exception of the situations in Sudan and Libya, which were initiated by the UNSC. The only situation emanating from the *proprio motu* action of the

15 As this article aims to provide a short introduction to the -year practice of the ICC and aid readers unfamiliar with the documentation system of the ICC, I do not refer to the adopted legal document but to the ICC press releases, which contain functioning hyperlinks to the given judgments, reports, and decisions. Exception is made where *verbatim* citation is necessary.

16 <https://www.icc-cpi.int/darfur/albashir>, (Accessed: July 1, 2023).

17 <https://www.icc-cpi.int/kenya/kenyatta>, (Accessed: July 1, 2023).

18 <https://www.icc-cpi.int/kenya/rutosang>, (Accessed: July 1, 2023).

19 <https://www.icc-cpi.int/cdi/gbagbo-goude>, (Accessed: July 1, 2023).

20 <https://www.icc-cpi.int/cdi/simone-gbagbo>, (Accessed: July 1, 2023).

21 <https://www.icc-cpi.int/cdi/gbagbo-goude>, (Accessed: July 1, 2023).

22 <https://www.icc-cpi.int/mali/al-hassan>, (Accessed: July 1, 2023).

23 <https://www.icc-cpi.int/mali/al-mahdi>, (Accessed: July 1, 2023).

24 <https://www.icc-cpi.int/car/bemba>, (Accessed: July 1, 2023).

25 <https://www.icc-cpi.int/libya/gaddafi>, (Accessed: July 1, 2023).

26 <https://www.icc-cpi.int/drc/katanga>, (Accessed: July 1, 2023).

27 <https://www.icc-cpi.int/drc/lubanga>, (Accessed: July 1, 2023).

28 <https://www.icc-cpi.int/drc/ngudjolo>, (Accessed: July 1, 2023).

29 <https://www.icc-cpi.int/drc/ntaganda>, (Accessed: July 1, 2023).

30 <https://www.icc-cpi.int/uganda/ongwen>, (Accessed: July 1, 2023).

31 <https://www.icc-cpi.int/carII/yekatom-ngaissona>, (Accessed: July 1, 2023).

Prosecutor was the Kenyan situation. However, this did not change the view of locally influential papers and journalists.

As a result of geographical proximity, the permeability of state boundaries, and the transboundary manoeuvring capacity of different military and paramilitary units, there was an undeniable overlap between armed actions and crimes perpetrated in the context of the situations in Sudan, Uganda, the Democratic Republic of Congo (DRC), and the Central African Republic. This fact did not prevent journalists and politicians from going ahead with their preconceptions.

Similarly, the official and public reference of the Office of the Prosecutor (OTP) on engaged preliminary examinations in the situation in Afghanistan (2007), Colombia (2006), Georgia (2008), and Honduras (2010),³² which also appeared in numerous statements and press releases, did little to convince those who were interested in propagating these stereotypes.

Media close to the victims of these undeniable atrocities were more proactive in their following of the procedures, criticising the ICC for the length of the procedure and the eventual acquittals (or stay of proceedings) pronounced in the cases concerning Kenyan and Ivorian politicians. The “Demonstration Corner” beside the ICC compound was often used for gatherings calling on the ICC to take greater action against war crimes or crimes against humanity committed in Africa.

Several Member States pushed the African Union to convince the General Assembly of the United Nations (UNGA) to ask the International Court of Justice (ICJ) for an advisory opinion regarding the immunity of heads of states in international law with special regard to procedures before the ICC.³³ The UNGA has yet to seize the ICJ and it would appear that with the stay of proceedings (i.e. *de facto* acquittals) ordered in the Kenyatta, Ruto, Gbagbo, and Blé Goude cases, as well as Al Bashir’s destitution and imprisonment in Sudan, African states no longer insist on the adoption of such a resolution.

2.5. “Out of Africanism” (reaction or logical consequences?)

As mentioned in the previous point, anti-Africanism is an unjust and unsubstantiated allegation. Nevertheless, it has undoubtedly had a significant impact on public opinion.

Although already present under the first prosecutor, Luis Moreno Ocampo, the enhanced attention paid to non-African situations became much more perceptible under his successors, Fatou Bensouda and Karim Khan. As a result of the advancement of analysis and steps taken in non-African countries and the emergence of new armed conflicts with all their inhumane consequences, the OTP’s agenda

32 See, for example, Report on Preliminary Examination Activities (2011), <https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/63682F4E-49C8-445D-8C13-F310A4F3AEC2/284116/OTPReportonPreliminaryExaminations13December2011.pdf>, (Accessed: July 1, 2023) pp. 6, 9, 14, 18.

33 Pillai 2023.

concerning preliminary examinations³⁴ and investigations³⁵ came to include ten “situation countries” from other continents, while the nationality of the alleged perpetrators pointed to even more non-African states. New self-referrals have also been submitted.³⁶

Certainly, in some “situations”, the Prosecutor concluded that he/she would not open an investigation for reasons like lack of gravity (e.g. when the Israeli Navy used force to prevent the Mavi Marmara and other steamships from breaching the large, contested, and unilaterally imposed maritime blockade on the Mediterranean coast of the Gaza strip of Palestine),³⁷ or on the basis of recognising the satisfaction of the criteria of complementarity (e.g. the preliminary examination concerning war crimes committed by British soldiers in Iraq³⁸ and the situation in Colombia³⁹).

- 34 In 2020: Bolivia, Colombia, Palestine, Iraq/UK, Philippines, Ukraine, Venezuela Report on Preliminary Examination Activities 2020, <https://www.icc-cpi.int/sites/default/files/itemsDocuments/2020-PE/2020-pe-report-eng.pdf>, (Accessed: July 1, 2023) pp. 21, 24, 27, 28, 45, 55, 59, 68.
- 35 Concerning regions outside Africa, in 2023, there were investigations of perpetrators in situations concerning Afghanistan, Georgia, Myanmar, Palestine, and the Philippines. <https://www.icc-cpi.int/> (Accessed: July 1, 2023) (See under: Situations and cases).
- 36 Statement of the Prosecutor of the International Criminal Court, Mrs Fatou Bensouda, on the referral by Bolivia regarding the situation in its own territory, <https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-mrs-fatou-bensouda-referral-bolivia>, (Accessed: July 1, 2023).
- 37 Registered Vessels of Comoros, Greece and Cambodia, ICC-01/13, <https://www.icc-cpi.int/comoros> (Accessed: July 1, 2023); ICC Pre-Trial Chamber I rejects Comoros’ request for judicial review of the Prosecutor’s decision not to open an investigation, <https://www.icc-cpi.int/news/icc-pre-trial-chamber-i-rejects-comoros-request-judicial-review-prosecutors-decision-not-open>, (Accessed: July 1, 2023); Situation on the Registered Vessels of Comoros, Greece and Cambodia: ICC Appeals Chamber rejects the Prosecutor’s appeal, <https://www.icc-cpi.int/news/situation-registered-vessels-comoros-greece-and-cambodia-icc-appeals-chamber-rejects>, (Accessed: July 1, 2023); ICC Pre-Trial Chamber I requests Prosecutor to reconsider decision not to investigate situation referred by Union of Comoros, <https://www.icc-cpi.int/news/icc-pre-trial-chamber-i-requests-prosecutor-reconsider-decision-not-investigate-situation>, (Accessed: July 1, 2023).
- 38 Report on Preliminary Examination Activities (2020)—Iraq/UK, <https://www.icc-cpi.int/news/report-preliminary-examination-activities-2020-iraq/uk>, (Accessed: July 1, 2023); Statement of the Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination of the situation in Iraq/United Kingdom, <https://www.icc-cpi.int/news/statement-prosecutor-fatou-bensouda-conclusion-preliminary-examination-situation-iraq/united>, (Accessed: July 1, 2023).
- 39 ICC Prosecutor, Mr Karim A. A. Khan QC, concludes the preliminary examination of the Situation in Colombia with a Cooperation Agreement with the Government charting the next stage in support of domestic efforts to advance transitional justice, <https://www.icc-cpi.int/news/icc-prosecutor-mr-karim-khan-qc-concludes-preliminary-examination-situation-colombia>, (Accessed: July 1, 2023); Statement of ICC Prosecutor Karim A. A. Khan KC on conclusion of technical visit of the Office of the Prosecutor to Colombia, <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-conclusion-technical-visit-office-prosecutor>, (Accessed: July 1, 2023).

However, other preliminary examinations led to the opening an investigation, including the situations in Afghanistan,⁴⁰ Bangladesh/Myanmar,⁴¹ Georgia,⁴² Palestine,⁴³ the Philippines,⁴⁴ Ukraine,⁴⁵ and Venezuela.⁴⁶

- 40 ICC judges authorise Prosecution to resume investigation in Afghanistan, <https://www.icc-cpi.int/news/icc-judges-authorise-prosecution-resume-investigation-afghanistan>, (Accessed: July 1, 2023); Statement of the Prosecutor of the International Criminal Court, Karim A. A. Khan QC, following the application for an expedited order under article 18(2) seeking authorisation to resume investigations in the Situation in Afghanistan, <https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-karim-khan-qc-following-application>, (Accessed: July 1, 2023); Statement of the Prosecutor of the International Criminal Court, Karim A. A. Khan QC, on the escalating violence in the Situation in Afghanistan, <https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-karim-khan-qc-escalating-violence-situation>, (Accessed: July 1, 2023); Afghanistan: ICC Appeals Chamber authorises the opening of an investigation, <https://www.icc-cpi.int/news/afghanistan-icc-appeals-chamber-authorises-opening-investigation>, (Accessed: July 1, 2023); ICC judges reject opening of an investigation regarding Afghanistan situation, <https://www.icc-cpi.int/news/icc-judges-reject-opening-investigation-regarding-afghanistan-situation>, (Accessed: July 1, 2023).
- 41 ICC Pre-Trial Chamber I rules that the Court may exercise jurisdiction over the alleged deportation of the Rohingya people from Myanmar to Bangladesh, <https://www.icc-cpi.int/news/icc-pre-trial-chamber-i-rules-court-may-exercise-jurisdiction-over-alleged-deportation>, (Accessed: July 1, 2023); ICC judges authorise opening of an investigation into the situation in Bangladesh/Myanmar, <https://www.icc-cpi.int/news/icc-judges-authorise-opening-investigation-situation-bangladesh/myanmar>, (Accessed: July 1, 2023).
- 42 ICC Pre-Trial Chamber I authorises the Prosecutor to open an investigation into the situation in Georgia, <https://www.icc-cpi.int/news/icc-pre-trial-chamber-i-authorises-prosecutor-open-investigation-situation-georgia>, (Accessed: July 1, 2023); Situation in Georgia: ICC Pre-Trial Chamber delivers three arrest warrants, <https://www.icc-cpi.int/news/situation-georgia-icc-pre-trial-chamber-delivers-three-arrest-warrants>, (Accessed: July 1, 2023).
- 43 <https://www.icc-cpi.int/palestine>; Statement of ICC Prosecutor, Fatou Bensouda, respecting an investigation of the Situation in Palestine, <https://www.icc-cpi.int/news/statement-icc-prosecutor-fatou-bensouda-respecting-investigation-situation-palestine>, (Accessed: July 1, 2023); ICC Pre-Trial Chamber I issues its decision on the Prosecutor’s request related to territorial jurisdiction over Palestine, <https://www.icc-cpi.int/news/icc-pre-trial-chamber-i-issues-its-decision-prosecutors-request-related-territorial>, (Accessed: July 1, 2023).
- 44 Situation in the Philippines: ICC Pre-Trial Chamber I authorises the opening of an investigation, <https://www.icc-cpi.int/news/situation-philippines-icc-pre-trial-chamber-i-authorises-opening-investigation>, (Accessed: July 1, 2023); ICC Pre-Trial Chamber I authorises Prosecutor to resume investigation in the Philippines, <https://www.icc-cpi.int/news/icc-pre-trial-chamber-i-authorises-prosecutor-resume-investigation-philippines>, (Accessed: July 1, 2023).
- 45 Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova, <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and>, (Accessed: July 1, 2023); Statement by Prosecutor Karim A. A. Khan KC on the issuance of arrest warrants against President Vladimir Putin and Ms Maria Lvova-Belova, <https://www.icc-cpi.int/news/statement-prosecutor-karim-khan-kc-issuance-arrest-warrants-against-president-vladimir-putin>, (Accessed: July 1, 2023); Statement of ICC Prosecutor, Karim A. A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation, <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states>, (Accessed: July 1, 2023).
- 46 Statement of the Prosecutor of the International Criminal Court, Karim A. A. Khan KC, following the application for an order under article 18(2) seeking authorisation to resume investigations

Despite the easy media accessibility of the ICC's press releases briefly explaining the actual issues, a large proportion of the African press continued to advance allegations concerning the ICC's "biased" approach and "legal colonialism". However, the purpose of continuing with other dockets is not to please the media, but to perform the ICC's legal duties in accordance with the statute.

2.6. *Comparatism (or how to assess efficacy)*

During the first two decades, the ICC received plenty of both professional and constructive criticism and unfriendly, politically-oriented criticism. Procedures were deemed lengthy, costly, and inefficient, and as targeting only low-level perpetrators and third world countries (i.e. 'cherry picking from the lowest branches of the tree'). The Court was also criticised for using "legal English" and "*français juridique*", language that can only be understood by academics and professionals of international criminal law.

What institution can the ICC be compared to in this respect?

Comparing the ICC to national criminal tribunals would be *ab ovo* incorrect for several reasons. (i) Generally speaking, national criminal tribunals operate in different legal and factual circumstances, in co-operation with the national police, and already possess data and facts about similar crimes. (ii) Doing so would raise the question of which tribunals should be chosen and from which country. (iii) Choosing a tribunal from a "situation country" collide with the principle of complementarity. After all, the reason for the ICC's involvement is that the national prosecution did not function properly in respect to crimes falling under Article 5 of the Rome Statute in the given country. (iv) If we choose a tribunal in a state far from the conflict situations, what type of cases should be chosen for comparison? Simple cases, complicated cases, or only cases—if any—adjudicated on the basis of the exercise of universal jurisdiction, linked with facts that occurred far away, and in a state using another language? (v) If we choose the example of "small Nuremberg tribunals", that is, American military tribunals, it is not guaranteed that their jurisprudence would be as appreciated in all cases as that of the International Military Tribunal. Remember, for example, the case of Edmund Veessenmayer,⁴⁷ who was arrested in 1945, and charged with crimes against humanity, slavery, and membership to a

in the Situation in Venezuela I, <https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-karim-khan-kc-following-application-order>, (Accessed: July 1, 2023); ICC Prosecutor, Karim A. A. Khan QC, notifies Pre-Trial Chamber I of a request from the Bolivarian Republic of Venezuela to defer his investigation under article 18(2) of Rome Statute and confirms intention to apply for authority to resume investigations, <https://www.icc-cpi.int/news/icc-prosecutor-karim-aa-khan-qc-notifies-pre-trial-chamber-i-request-bolivarian-republic>, (Accessed: July 1, 2023); ICC Prosecutor, Mr Karim A. A. Khan QC, opens an investigation into the Situation in Venezuela and concludes Memorandum of Understanding with the Government, <https://www.icc-cpi.int/news/icc-prosecutor-mr-karim-aa-khan-qc-opens-investigation-situation-venezuela-and-concludes>, (Accessed: July 1, 2023).

47 https://en.wikipedia.org/wiki/Edmund_Veesenmayer, (Accessed: July 1, 2023).

criminal organisation. Although condemned to twenty years imprisonment in 1949, his sentence was subsequently reduced to ten years and he was released in 1951. In other words, he served only six years for masterminding the 1944 deportation of the Hungarian Jewry together with Adolf Eichman, knowing that the “Final Solution” meant their extermination.

Comparing the ICC to other international tribunals and courts would provide a different picture depending on the given international judicial institution. (i) Concerning their “objective” importance, of the many issues brought before the ICJ, only a few cases qualify. (ii) If we compare the ICC to regional human rights tribunals, other challenges emerge, such as the fact that procedures are rather lengthy. Consider the European Court of Human Rights (ECHR), which, a victim of its earlier success, is swamped by applications that cannot be adjudged as expeditiously as in the 1970s and 1980s. Although the experiences concerning the execution of ECHR judgments are generally highly favourable, some judgments have yet to be executed and some former Member States have denounced the European Convention on Human Rights and left the Council of Europe (e.g. Greece between 1967 and 1974, and Russia in 2022).

Comparing the ICC’s performance to that of other international criminal tribunals may be more appropriate, although several facts should be borne in mind, including (i) the special historical circumstances at the end of Second World War, the unconditional surrender of the Axis powers, the allied occupation of Germany and Japan, and so on. It is also worth considering (ii) the fact that the ICTY and ICTR examined cases in countries where international military intervention was needed for pacification; where the UNSC and the P5 were “surprisingly” unanimous in the necessity of executing the decisions; where the European Union could also exert influence on the Serbia, Croatia, Bosnia-Herzegovina to co-operate; where the situations under examination were interrelated; and where issues concerning translation and transcription were important, particularly in respect to the written form of the Serbian and Croatian languages using the Cyrillic or Latin alphabet. Even in the case of the ICTY, the capture and condemnation of those most responsible, namely, Radovan Karadžić and Ratko Mladić, happened much later⁴⁸ than the original establishment of the ICTY in 1993 (Another top official was Slobodan Milošević, who was arrested in 2001, but died during his trial in 2006.)

Nevertheless, comparing the ICC and the ICTY and ICTR is a legitimate approach in terms of the legal reasoning and the similarity of the legal notions in their judgments and decisions.

While this might seem apologetic coming from me, the most useful approach is to compare the ICC to itself, taking into account how a prior judgment (or even an acquittal) can enhance the understanding and management of a new case related to

48 Radovan Karadžić was arrested in 2008, and condemned at first instance in 2016 and at appeal in 2018. Ratko Mladić was arrested in 2011, and condemned at first instance in 2017 and at appeal in 2021.

the same situation. Examples include the Lubanga and Ntaganda cases and Katanga and Ngudjulo cases in the Ituri Province of the Democratic Republic of Congo; the Al Mahdi and Al Hassan cases in Mali; and the Bemba, Yekatom and Ngaïssona, Maxim Mokom, and Kani cases in the Central African Republic.

2.7. “Human rights’ protectionism” (to protect the rights of the accused and to protect victims and witnesses)

The protection of human rights is a *sine qua non* for courts and their judges, including the ICC. Criminal law procedures should be led with due respect to the fair trial principle, the precise sub-rules of which are enumerated in detail in the Rome Statute and related documents mentioned earlier, particularly the Rules of Procedure and Evidence.

Complementary is underpinned by the *ne bis idem* principle and the presumption of innocence has the same consequence as it does in national systems. If the pre-trial chamber is not convinced that the submitted evidence reaches the threshold of having “substantial grounds to believe” that the prosecutor’s charges can be confirmed, the procedure cannot continue to trial. During the trial, if the prosecutor fails to prove “beyond any reasonable doubt” that the indictee has committed the crime with which they are charged, the judge cannot pronounce condemnation.

These rules are obvious to every lawyer.

The challenges facing the ICC were interrelated with issues concerning the collection of evidence, including a lack of genuine co-operation from states and security issues, where direct or indirect pressure was applied and witnesses disappeared, died, or significantly altered their testimony compared to their previous encounters with the OTP. Elapsed time, faded memory, error, or lack of attention when checking the reliability of witnesses in due course can contribute to a successful “no case to answer” motion, presented *supra*.

On the other side of the coin is the imperative to protect witnesses, who are often victims of the crimes charged. They should be protected from re-traumatisation and from potential social rejection and stigmatisation, such as in cases of forced marriage and childbearing.

Witness protection is justified when witnesses they are threatened by the accused’s sympathisers acting for political or sometimes clan related reasons. Moreover, many witnesses are so-called “insiders” giving testimony against their former superior and thus often have a reasonable fear of retaliation.

As a consequence of the different witness protection measures, the “open trial” principle encounters difficulties in the gallery of the trial room and internet-based video transmissions due to the frequently ordered “private sessions” and the corresponding redactions in the publicly accessible transcripts.

2.8. Humanism (*participation of victims and assistance and reparation for victims*)

As it is often emphasised, one of the novelties of the judicial system of the ICC is granting victims procedural status at an international level, namely, a *sui generis* status during pre-trial and trial proceedings and full party status during the reparation proceedings. Institutionalised participation in the pre-trial and trial phase, where the parties are the Prosecutor and the charged person assisted by his/her defence, involves the right to submit views, question witnesses, and call their own witnesses if needed. During the reparation procedure, the parties are the victims and the condemned person.

The ICC’s victim-oriented approach is particularly overt in reparation and assistance proceedings. While the direct addressee of the reparation is the condemned person, it falls on the international community to provide financial help if the condemned is indigent, which is often the case. Here, the most important actors are the given trial chamber rendering reparation orders and the Trust Fund for Victims, which enjoys considerable statutory autonomy in managing the implementation of reparation and assistance. The latter can also reach those who were victims of the situation but not of the case (e.g. *inter alia* because the case has very concrete material, geographical, temporal, or personal parameters according to the confirmed charges and the sentencing judgment).

Despite their different legal nature, reparation and assistance are realised in a very similar manner in the field. They are primarily realised through medical, psychological, educational or professional training services, coupled with useful kits to launch small artisanal or agricultural businesses, and aid finding a job on the local labour market. The main challenge in this respect is the undeniable length of the decision-making procedure and the budgetary considerations of the state, which limit its generosity.⁴⁹ It is worth noting that while the United Nations Educational,

49 Regarding aspects of the reparation, see: Realising reparative programmes in challenging times, [https://www.trustfundforvictims.org/sites/default/files/inline-files/TFV Annual Report 2021.pdf](https://www.trustfundforvictims.org/sites/default/files/inline-files/TFV%20Annual%20Report%202021.pdf), (Accessed: July 1, 2023); Trust Fund for Victims Management Brief—October 2020, [https://www.trustfundforvictims.org/sites/default/files/reports/TFV Management Brief - October 2020_2.pdf](https://www.trustfundforvictims.org/sites/default/files/reports/TFV%20Management%20Brief%20-%20October%202020_2.pdf), (Accessed: July 1, 2023); Rauxloh Regina E.: Good intentions and bad consequences: The general assistance mandate of the Trust Fund for Victims of the ICC, Published online by Cambridge University Press: 19 October 2020, <https://www.cambridge.org/core/journals/leiden-journal-of-international-law/article/good-intentions-and-bad-consequences-the-general-assistance-mandate-of-the-trust-fund-for-victims-of-the-icc/F4831BF9DBB0C617AB1FD8DE70B5D7DB>, (Accessed: July 1, 2023); Brodney, Marissa and Regué, Meritxell: Formal, Functional, and Intermediate Approaches to Reparations Liability: Situating the ICC’s 15 December 2017 Lubanga Reparations Decision, EJIL: Talk! January 4, 2018, <https://www.ejiltalk.org/formal-functional-and-intermediate-approaches-to-reparations-liability-situating-the-iccs-15-december-2017-lubanga-reparations-decision/>, (Accessed: July 1, 2023); Brodney, Marissa and Regué, Meritxell: Five Procedural Takeaways from the ICC’s 18 July 2019 Lubanga Second Reparations Judgment, EJIL: Talk! September 13, 2019, <https://www.ejiltalk.org/author/mregue/>, (Accessed: July 1, 2023); Kovács Péter: Victims’ Right to Reparation in Light of Institutional and Financial Challenges: The International Criminal Court and the

Scientific and Cultural Organisation (UNESCO) realised the reconstruction of the destroyed World Heritage historical monuments in Timbuktu within a short time, the fragility of the security situation in Mali hampers the revival of international tourism, which used to be the main source of the population's income.

2.9. Activism vs. textualism

Like other international tribunals and national constitutional courts, the jurisprudence of the ICC can be analysed using to the dichotomy of activism and textualism. It goes without saying that as an international tribunal, the ICC needs the support of States based on their understanding of and confidence in this organisation and its objectives. States will have difficulties understanding and trusting the ICC if the jurisprudence is contradictory, unclear, unsubstantiated, and cannot be calculated in advance with relative certainty.

However, the text of the Rome Statute is admittedly difficult to read. Varying interpretations may arise from the conjunction of different articles relatively far from one another or the position of a given disposition in the framework of an article having a special title sometimes used to refer to another issue altogether. This occurred *inter alia* in the case of Article 19(3), where the judges consented to the Prosecutor's interpretation of it as a possible preliminary ruling, although it is not necessarily related to a challenge, despite the title of the article.⁵⁰ In the "Myanmar decision", the Pre-Trial Chamber felt that the Prosecutor's question could be answered on another basis without making a decision about the interpretation of Article 19(3); however, in the "Palestine decision", it concluded that the submitted interpretation of the applicability of Article 19(3) was correct. The review of the jurisdictional competence in Article 19(1) is clearly the duty of the Court, regardless of whether there is no formal challenge, and Article 19(3) can be interpreted similarly. Moreover, neither paragraph contains the word "challenge".⁵¹

Reparation for the Victims of the Bogoro Massacre, East European Yearbook on Human Rights 2018 (1), pp. 100–124.

50 Rome Statute, Article 19, Challenges to the jurisdiction of the Court or the admissibility of a case: *The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17. Challenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court may be made by: (a) An accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58; (b) A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted; or (c) A State from which acceptance of jurisdiction is required under article 12. The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility. In proceedings with respect to jurisdiction or admissibility, those who have referred the situation under article 13, as well as victims, may also submit observations to the Court.*

51 See: <https://www.icc-cpi.int/news/icc-pre-trial-chamber-i-rules-court-may-exercise-jurisdiction-over-alleged-deportation>, (Accessed: July 1, 2023); Decision on the 'Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute', ICC-RoC46(3)-01/18-37 06-09-2018, https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2018_04203.PDF, (Accessed: July 1, 2023),

As noted, the “no case to answer” procedure was recognised by the Court as belonging to the general principles of law. The recognition of a special form of complicity (“indirect co-perpetration”) also resulted from a jurisprudential decision.⁵²

On the other hand, the need for or ability of activism has been curbed by the scrupulous observation of fair trial guarantees, formulated according to the text of the International Covenant on Civil and Political Rights, wherein the delegations in Rome sought to reflect the common elements of their criminal procedural legal systems. Other key examples of textualism include the verbatim analogy of the different forms of genocide in the Rome Statute and Convention on the Prevention and Punishment of the Crime of Genocide (1948), the transposition of basic rules of the Geneva Conventions (1949), the development of the additional protocols (1977) with special regard to what these instruments qualify as “grave breaches” of international humanitarian law, and the transposition of core elements of different conventions regarding crimes against humanity or the prohibition of some special types of weapons and methods of warfare. Adopted by the ASP, Elements of Crimes, an interpretative document enjoying a statutory priority,⁵³ was conceived as means of ensuring governments that judges are limited in their sympathy towards activism.

As the institution of the *amicus curiae* is recognised in the Rules of Procedure and Evidence, several non-governmental organisations (NGOs) working in the field of human rights, having received permission to contribute, have been gently pushing the ICC chambers to be more open or to follow a certain type of jurisdictional interpretation as developed by other international tribunals. These proposals often suggest an enhanced activism on behalf of conservative judges.

2.10. Criminal law centrism and international law centrism

According to the Rome Statute, the ICC is both an international and a criminal court. This dual character is reflected in the composition of the judiciary.⁵⁴ While

pp. 10–15, §§ 26–33; <https://www.icc-cpi.int/news/icc-pre-trial-chamber-i-issues-its-decision-prosecutors-request-related-territorial>, (Accessed: July 1, 2023); Decision on the ‘Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine’, ICC-01/18-143 05-02-2021, https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_01165.PDF, (Accessed: July 1, 2023), pp. 30–36, §§ 63–82.

52 On the history of ‘indirect co-perpetration’ in ICC jurisprudence, see, for example, Slidregt, Elies van: The ICC Ntaganda Appeals Judgment: The End of Indirect Co-perpetration? <https://www.justsecurity.org/76136/the-icc-ntaganda-appeals-judgment-the-end-of-indirect-co-perpetration/>, (Accessed: July 1, 2023).

53 See the hierarchy in Article 21 of the Rome Statute (precited).

54 Rome Statute, Article 36, Qualifications, nomination and election of judges:

3. (a) *The judges shall be chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices.*

(b) *Every candidate for election to the Court shall:*

(i) *Have established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings; or*

most of the day-to-day activities and decisions are related to criminal law, international law with all its problems emerges regularly. For example, international law was in focus in (i) the litigation on the legal basis of the effect of the arrest warrant against Omar Al Bashir on non-States-Parties, (ii) the situation in Myanmar, and (iii) the decision on the situation in Palestine.

In the series of decisions on the impact of the arrest warrant issued against Al Bashir, then the head of state of Sudan, a non-State Party to the Statute, two jurisprudential approaches explained the applicability of the arrest warrant despite the immunity of heads of states, a traditional rule of customary law. In order to resolve the *prima facie* conflict between Article 27⁵⁵ and Article 98⁵⁶ of the Rome Statute and find a harmonising interpretation, one of the pre-trial chambers issued the so-called “Malawi decision”⁵⁷ (followed by the “Chad decision”⁵⁸ the next day),

(ii) *Have established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court;*

[...]

For the purposes of the election, there shall be two lists of candidates:

List A containing the names of candidates with the qualifications specified in paragraph 3 (b) (i); and

List B containing the names of candidates with the qualifications specified in paragraph 3 (b) (ii).

A candidate with sufficient qualifications for both lists may choose on which list to appear. At the first election to the Court, at least nine judges shall be elected from list A and at least five judges from list B. Subsequent elections shall be so organized as to maintain the equivalent proportion on the Court of judges qualified on the two lists.

- 55 Rome Statute, Article 27, Irrelevance of official capacity:

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

- 56 Rome Statute, Article 98, Cooperation with respect to waiver of immunity and consent to surrender:

1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

- 57 ‘43. For the above reasons and the jurisprudence cited earlier in this decision, the Chamber finds that customary international law creates an exception to Head of State immunity when international courts seek a Head of State’s arrest for the commission of international crimes. There is no conflict between Malawi’s obligations towards the Court and its obligations under customary international law; therefore, article 98(1) of the Statute does not apply’. Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-139 12-12-2011, https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2011_21722.PDF, (Accessed: July 1, 2023), § 43, p. 20.

- 58 Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-140-tENG 23-03-2012, <https://www.icc-cpi.int/>

well-substantiated with jurisprudential references to the ICJ and international criminal tribunals of the twentieth century. The two decisions postulated the clear emergence of a customary law denying the existence of immunity when crimes against humanity and war crimes are alleged against the given person. However, in the “DRC decision”, another pre-trial chamber emphasised the legal impact of the UNSC referral issued under Chapter VII of the UN Charter, which “implicitly lifted” Al Bashir’s immunity.⁵⁹

The Appeals Chamber had to deal with the problem of Al Bashir’s arrest warrant vs. immunity in the Jordan appeal decision concerning another pre-trial chamber’s decision, which also founded its argumentation on the impact of a UNSC resolution.⁶⁰ It decided in favour of the customary law approach,⁶¹ adding that the UNSC referring resolution duly considered the special rules of the Rome Statute.⁶²

sites/default/files/CourtRecords/CR2012_04203.PDF, (Accessed: July 1, 2023), §§ 13, 14, pp. 7–8

59 ‘31. Further, according to article 103 of the UN Charter “[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the [...] Charter shall prevail.” Considering that the SC, acting under Chapter VII, has implicitly lifted the immunities of Omar Al Bashir by virtue of Resolution 1593(2005), the DRC cannot invoke any other decision, including that of the African Union, providing for any obligation to the contrary.

32. *In view of the foregoing, the Chamber considers that the DRC not only disregarded the 2009 and 2010 Requests related to its obligation to cooperate in the arrest and surrender of Omar Al Bashir, pursuant to articles 86 and 89 of the Statute, but also SC Resolution 1593(2005). This course of action calls upon the SC and the Assembly of States Parties to take the necessary measures they deem appropriate’.* Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir’s Arrest and Surrender to the Court, ICC-02/05-01/09-195 09-04-2014, https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2014_03452.PDF, (Accessed: July 1, 2023), §§ 31,32, p. 15.

60 Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender of Omar Al-Bashir, ICC-02/05-01/09-309 11-12-2017, https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2017_07156.PDF, (Accessed: July 1, 2023), §§ 38–39, p. 15.

61 ‘1. *There is neither State practice nor opinio juris that would support the existence of Head of State immunity under customary international law vis-à-vis an international court. To the contrary, such immunity has never been recognised in international law as a bar to the jurisdiction of an international court.*

2. *The absence of a rule of customary international law recognising Head of State immunity vis-à-vis international courts is relevant not only to the question of whether an international court may issue a warrant for the arrest of a Head of State and conduct proceedings against him or her, but also for the horizontal relationship between States when a State is requested by an international court to arrest and surrender the Head of State of another State. No immunities under customary international law operate in such a situation to bar an international court in its exercise of its own jurisdiction’.*

Judgment in the Jordan Referral re Al-Bashir Appeal, ICC-02/05-01/09-397 06-05-2019, https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2019_02593.PDF, (Accessed: July 1, 2023), Key findings, §§ 1, 2, p. 5.

62 ‘7. Resolution 1593 gives the Court power to exercise its jurisdiction over the situation in Darfur, Sudan, which it must exercise “in accordance with [the] Statute.” This includes article 27(2), which provides that immunities are not a bar to the exercise of jurisdiction. As Sudan is obliged to “cooperate fully” with the Court, the effect of article 27(2) arises also in the horizontal relationship—Sudan cannot invoke Head of State immunity if a State Party is requested to arrest and surrender Mr Al-Bashir. Therefore, there was no Head of State immunity that Sudan could invoke in relation to Jordan, had the latter arrested Mr

In case of Al Bashir, both approaches lead to the same conclusion, namely, immunity is not opposable. The Appeals Chamber's preference for the "customary law" approach is important because of the impact of the reasoning on situations where the referral does not come from the UNSC.

Important questions of public international law appeared in the decisions concerning the situation in Myanmar (the so-called "Rohingya decisions"),⁶³ where one of the pre-trial chambers concluded on the objective legal personality of the ICC,⁶⁴ closely following the ICJ's *dictum* in the advisory opinion on Reparation for Injuries Suffered in the Service of the United Nations. It also emphasised that although Myanmar is not a State Party and the situation was not referred to the ICC by the UNSC, the ICC is competent because:

[P]reconditions for the exercise of the Court's jurisdiction pursuant to article 12(2)(a) of the Statute are, as a minimum, fulfilled if at least one legal element of a crime within the jurisdiction of the Court or part of such a crime is committed on the territory of a State Party.⁶⁵

Consequently,

[A]cts of deportation initiated in a State not Party to the Statute (through expulsion or other coercive acts) and completed in a State Party to the Statute (by virtue of victims crossing the border to a State) fall within the parameters of article 12(2)(a) of the Statute. It follows that, in the circumstances identified in the Request, the Court has jurisdiction over the alleged deportation of members

Al-Bashir on the basis of an arrest warrant issued by the Court. Accordingly, there was also no immunity that Jordan would have been required to "disregard" by executing the Court's arrest warrant. And there was no need for a waiver by Sudan of Head of State immunity'.

Judgment in the Jordan Referral re Al-Bashir Appeal, Key findings, § 7, p. 5.

63 <https://www.icc-cpi.int/news/icc-pre-trial-chamber-i-rules-court-may-exercise-jurisdiction-over-alleged-deportation>, (Accessed: July 1, 2023); <https://www.icc-cpi.int/news/icc-judges-authorise-opening-investigation-situation-bangladesh/myanmar>, (Accessed: July 1, 2023).

64 '48. In the light of the foregoing, it is the view of the Chamber that more than 120 States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity called the "International Criminal Court," possessing objective international personality, and not merely personality recognized by them alone, together with the capacity to act against impunity for the most serious crimes of concern to the international community as a whole and which is complementary to national criminal jurisdictions. Thus, the existence of the ICC is an objective fact. In other words, it is a legal-judicial-institutional entity which has engaged and cooperated not only with States Parties, but with a large number of States not Party to the Statute as well, whether signatories or not.

49. Having said that, the objective legal personality of the Court does not imply either automatic or unconditional *erga omnes* jurisdiction. The conditions for the exercise of the Court's jurisdiction are set out, first and foremost, in articles 11, 12, 13, 4 and 15 of the Statute. [...] Decision on the 'Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute', ICC-RoC46(3)-01/18-37 06-09-2018, https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2018_04203.PDF, (Accessed: July 1, 2023), §§ 48, 49, p. 29.

65 Decision on the 'Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute', § 64, p. 36.

*of the Rohingya people from Myanmar to Bangladesh, provided that such allegations are established to the required threshold.*⁶⁶

The other pre-trial chamber gave the Prosecutor—acting *proprio motu*—the authorisation to investigate.⁶⁷

Highly complex international law questions were involved in the situation in Palestine,⁶⁸ where the pre-trial chamber concluded by majority on the existence of its jurisdictional competence.⁶⁹ To this, I appended a dissent because I felt that the truly important international law parameters were not examined in the decision, and that their proper analysis would have led to the conclusion that the ICC had no jurisdictional competence in the matter. Examples of international law parameters that should have been examined include (i) the differences between a full state and a *nasciturus* state; (ii) the nature and constitutive elements of the “state-territory” and the “territory of a state”; (iii) the impact of unilateral and parallel commitments vis-à-vis the “Quartet” mediating between Israel and the Palestinians; (iv) differences between the value of resolutions if adopted by the General Assembly and if adopted by the UNSC, and whether according to Chapter VI or Chapter VII; and (v) the legal relevance of the Oslo agreements.⁷⁰

2.11. Co-operationism (co-operation with states, international organisations and entities, and NGOs)

As we tell our students at least once a week, international law is based on state co-operation. The ICC also needs enhanced co-operation, with a special chapter of the Rome Statute (Part 9) devoted to this end. Articles 86–102 regulate the co-operation with States Parties and, if they are open to it, non-States Parties. Where co-operation is mandatory for States Parties, it is based on special agreement for non-States Parties.⁷¹ As noted above, some form of co-operation with non-States Parties can be derived from a UNSC referral adopted under Chapter VII, mandatory *erga omnes*.

66 Decision on the ‘Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute’, § 73, p. 42.

67 Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19-27 14-11-2019, https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2019_06955.PDF, (Accessed: July 1, 2023), § 125, pp. 54, 58.

68 <https://www.icc-cpi.int/news/icc-pre-trial-chamber-i-issues-its-decision-prosecutors-request-related-territorial>, (Accessed: July 1, 2023).

69 Decision on the ‘Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine’, ICC-01/18-143 05-02-2021, https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_01165.PDF, (Accessed: July 1, 2023).

70 Judge Péter Kovács’ Partly Dissenting Opinion, ICC-01/18-143-Anx1 05-02-2021, https://www.icc-cpi.int/sites/default/files/RelatedRecords/CR2021_01167.PDF, (Accessed: July 1, 2023).

71 Rome Statute, Article 87, Requests for cooperation: General provisions:
[...]

Co-operation can take multiple forms, including (i) the different forms of assistance and co-operation that The Netherlands, as a host State, grants the ICC on the basis of the headquarters agreement;⁷² (ii) securitisation of the ICC activity in the field;⁷³ (iii) judicial co-operation in the transmission of documents and information, particularly that involving teledata from phone- or internet-based contact managing companies; (iv) co-operation in some forensic matters;⁷⁴ (v) co-operation in the execution of arrest warrants; (vi) co-operation in tracing and freezing the assets of a person under arrest warrant; (vii) co-operation in witness protection;⁷⁵ (viii) co-operation concerning the admission of a condemned person from the ICC detention centre in Scheveningen to a national prison;⁷⁶ (ix) co-operation in the framework of the assessment of the complementarity criteria; (ix) co-operation in the reparation and assistance to which victims are entitled;⁷⁷ and (xi) a special form of co-operation assisting States in building up or transforming their judicial system in order to be able to prosecute those responsible for crimes against humanity and war crimes.⁷⁸

However, co-operation can be hindered by a number of factors. Problems can arise due to security issues in situation countries, which can affect the local functioning of the state administration (e.g. Afghanistan, DRC, and Mali). There is generally little to no co-operation when a “situation country” or State whose nationals

5..The Court may invite any State not party to this Statute to provide assistance under this Part on the basis of an *ad hoc* arrangement, an agreement with such State or any other appropriate basis.

Where a State not party to this Statute, which has entered into an *ad hoc* arrangement or an agreement with the Court, fails to cooperate with requests pursuant to any such arrangement or agreement, the Court may so inform the Assembly of States Parties or, where the Security Council referred the matter to the Court, the Security Council.

- 72 <https://www.icc-cpi.int/news/headquarters-agreement-between-international-criminal-court-and-host-state>, (Accessed: July 1, 2023).
- 73 <https://www.icc-cpi.int/news/ukraine-and-international-criminal-court-sign-agreement-establishment-country-office>, (Accessed: July 1, 2023).
- 74 <https://www.icc-cpi.int/news/office-prosecutor-international-criminal-court-partners-national-authorities-and-international>, (Accessed: July 1, 2023); <https://www.icc-cpi.int/news/icc-prosecutor-karim-aa-khan-qc-announces-deployment-forensics-and-investigative-team-ukraine>, (Accessed: July 1, 2023); <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-office-prosecutor-joins-national-authorities-joint>, (Accessed: July 1, 2023).
- 75 <https://www.icc-cpi.int/news/czech-republic-and-international-criminal-court-sign-agreement-witnesses-protection>, (Accessed: July 1, 2023).
- 76 <https://www.icc-cpi.int/news/bosco-ntaganda-transferred-belgian-prison-facility-serve-sentence>, (Accessed: July 1, 2023); <https://www.icc-cpi.int/news/icc-and-spain-conclude-agreement-enforcement-sentences>, (Accessed: July 1, 2023); <https://www.icc-cpi.int/news/agreement-between-republic-slovenia-and-international-criminal-court-enforcement-sentences>, (Accessed: July 1, 2023).
- 77 <https://www.icc-cpi.int/news/icc-and-ireland-sign-memorandum-understanding-voluntary-contributions-three-important-trust>, (Accessed: July 1, 2023).
- 78 <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-conclusion-technical-visit-office-prosecutor>; <https://www.icc-cpi.int/sites/default/files/itemsDocuments/20211028-OTP-COL-Cooperation-Agreement-ENG.pdf>; <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-regarding-opening-trial-related-events-28-september>, (Accessed: July 1, 2023).

may be potential perpetrators of crimes under investigation do not recognise the jurisdictional competence of the ICC. Co-operation may also cease after the ICC renders a decision considered unacceptable by the given country.

That said, refusal to co-operate and the issuing of sanctions concerning a given case does not necessarily exclude co-operation in other matters. Consider, for instance, the attitude of the US government under George W. Bush with what the media dubbed “The Hague Invasion Act”⁷⁹ and Donald Trump’s sanctioning of Fatou Bensouda, the ICC Prosecutor, and one of her collaborators.⁸⁰ In contrast, the US exhibited a highly co-operative attitude under Barack Obama and Joe Biden (who revoked Trump’s sanctions⁸¹), as reflected in official statements.⁸² Certainly, the US

79 American Service-Members’ Protection Act (ASPA, Title 2 of Pub. L. 107–206), <https://www.govinfo.gov/content/pkg/PLAW-107publ206/pdf/PLAW-107publ206.pdf> ; <https://2001-2009.state.gov/t/pm/rls/othr/misc/23425.htm>, (Accessed: July 1, 2023).

80 Executive Order 13928 on ‘Blocking Property of Certain Persons Associated with the International Criminal Court (ICC)’, <https://www.govinfo.gov/content/pkg/FR-2020-06-15/pdf/2020-12953.pdf>, (Accessed: July 1, 2023).

81 Joe Biden revoked this executive order. See: Ending Sanctions and Visa Restrictions against Personnel of the International Criminal Court, Press Statement, Anthony J. Blinken, Secretary of State, April 2, 2021, <https://www.state.gov/ending-sanctions-and-visa-restrictions-against-personnel-of-the-international-criminal-court/>

82 i. <https://il.usembassy.gov/the-United-states-opposes-the-icc-investigation-into-the-palestinian-situation/>, (Accessed: July 1, 2023).

ii. Remarks at the UN General Assembly Annual Debate on the International Criminal Court, Ambassador Richard Mills Deputy U.S. Representative to the United Nations, 10 November 2021:

‘As noted in the Court’s report on developments between August 2020 and August 2021, this has been a year of significant change and activity at the Court. The United States would like to commend the ICC for a number of achievements in some of the longest-running situations before the Court—situations involving national governments that invited the ICC to act because they were unable to do so. [...] We are pleased to have assisted in facilitating the voluntary surrender of Ongwen and the transfer of Ntaganda to the ICC. [...] Turning back to the ICC, we would also like to take note of the important effort underway relating to reform as the Court approaches its twentieth birthday. All organs of the Court and States Parties, working with other states, civil society, and victims, have engaged over the past year in consideration of a broad range of reforms, including those identified in the Independent Expert Review of the ICC.

Although, as this Assembly knows, the United States is not a State Party, we welcome these ongoing efforts to identify and implement reforms that will help the Court better achieve its core mission of serving as a court of last resort in punishing and deterring atrocity crimes. While we maintain our longstanding objection to the Court’s efforts to assert jurisdiction over personnel of non-States Parties absent a Security Council referral or the consent of the state, we believe that our concerns are best addressed through engagement with all stakeholders. Where domestic systems are unable or unwilling to genuinely pursue the justice that victims deserve, and that societies require to sustain peace, international courts such as the ICC can have a meaningful role. [...]’

<https://usun.usmission.gov/remarks-at-the-un-general-assembly-annual-debate-on-the-international-criminal-court/>, (Accessed: July 1, 2023).

iii. Secretary Antony J. Blinken on the Genocide and Crimes Against Humanity in Burma, 21 March 2022:

‘Efforts are moving forward, not only at the International Court of Justice, but also through the International Criminal Court and through the domestic courts of Argentina, in a case brought under universal jurisdiction.

The day will come when those responsible for these appalling acts will have to answer for them. [...]
<https://www.state.gov/secretary-antony-j-blinken-at-the-united-states-holocaust-memorial-museum/>, (Accessed: July 1, 2023)

iv. S.RES. 531:

'[...] the Senate—

(1) Strongly condemns the ongoing violence, war crimes, crimes against humanity, and systematic human rights abuses continually being carried out by the Russian Armed Forces and their proxies and President Putin's military commanders, at the direction of President Vladimir Putin;

(2) Encourages member states to petition the ICC and the ICJ to authorize any and all pending investigations into war crimes and crimes against humanity committed by the Russian Armed Forces and their proxies and President Putin's military commanders, at the direction of President Vladimir Putin;

(3) Supports any investigation into war crimes, crimes against humanity, and systematic human rights abuses levied by President Vladimir Putin, the Russian Security Council, the Russian Armed Forces and their proxies, and President Putin's military commanders; [...]

<https://www.congress.gov/bill/117th-congress/senate-resolution/531>, (Accessed: July 1, 2023).

v. 8948th meeting, SC/14766, 17 January 2022—Briefing Security Council on Darfur, Prosecutor Urges Sudan Government Provide International Criminal Court Safe Access to Crime Scenes, Witnesses:

'Richard M. Mills, JR., (United States) said his country has participated in assemblies of States Parties to the Rome Statute as an observer and stands ready to engage with the Court to bring accountability to the most serious crimes. His delegation welcomes the strengthening of the Office of Prosecutor and the Court and the Prosecutor's position on prioritizing the Council's referral of Sudan to the Court. He also welcomed the Prosecutor's visit to Darfur in August and the appointment of a Special Adviser. [...]
<https://press.un.org/en/2022/sc14766.doc.htm>, (Accessed: July 1, 2023).

vi. Remarks at a UN Security Council Arria-Formula Meeting on Ensuring Accountability for Atrocities Committed by Russia in Ukraine. Ambassador Beth Van Schaack, Ambassador-at-Large for Global Criminal Justice:

'The United States is supporting a range of international investigations into atrocities in Ukraine. This includes those conducted by the International Criminal Court, the United Nations, and the Organization for Security and Cooperation in Europe. The United States welcomes the opening of the investigation by the ICC into atrocity crimes committed in Ukraine, and we intend to engage with all stakeholders to achieve our common objectives in ensuring justice. [...]

<https://usun.usmission.gov/remarks-at-a-un-security-council-arria-formula-meeting-on-ensuring-accountability-for-atrocities-committed-by-russia-in-ukraine/>, (Accessed: July 1, 2023).

vii. Remarks by US Ambassador Beth Van Schaack, OAS Committee on Juridical and Political Affairs Technical Working Meeting to Strengthen Cooperation with the International Criminal Court, 16 June 2022:

'Over the past year and a half, the United States has worked hard to improve and reset our relationship with the ICC—through the lifting of sanctions that should never have been issued; a return to engagement with the Court and the Assembly of States Parties; and identifying specific areas where we can support ICC investigations and prosecutions, including steps to support the Court's work in Darfur and assistance on locating and apprehending ICC fugitives, including LRA leader Joseph Kony. We are looking to build on this foundation and identify areas where the US is well-positioned to help the Court succeed in carrying out its core mandate.

Over the past year, there have been significant developments by the ICC in this hemisphere, marking a cooperative and collaborative relationship with states, and a welcome respect for the varied approaches by national authorities to deliver justice and accountability in a manner consistent with national law and their obligations under the Rome Statute'.

<https://usoas.usmission.gov/remarks-by-u-s-ambassador-beth-van-schaack-on-strengthening-the-icc/>, (Accessed: July 1, 2023).

viii. Readout of Attorney General Merrick B. Garland's Trip to Ukraine, March 3, 2023:

'In addition, the United States became the first country to sign a memorandum of understanding (MOU)

position is of broad interest to the international press. The US made an important point at the Summit for Democracy (2023), asserting that ‘[w]e acknowledge the important role played by the ICC as a permanent and impartial tribunal complementary to national jurisdictions in advancing accountability for the most serious crimes under international law’.⁸³ Within the framework of the so-called G7, the US agreed to ‘reiterate our commitment to holding those responsible to account consistent with international law, including by supporting the efforts of international mechanisms, in particular the International Criminal Court’.⁸⁴

Regarding international organisations, co-operation with the UN is pre-eminent. Such co-operation is founded on documents like Negotiated Relationship Agreement between the International Criminal Court and the United Nations (2004),⁸⁵ which serves as the basis for a soft law paper entitled, Best Practices Manual for United

with the seven-member Joint Investigative Team (JIT) that is investigating Russian atrocities in Ukraine. The MOU, signed by the Attorney General, will facilitate the United States’ cooperation and coordination with the JIT members as we collect evidence and investigate Russia’s atrocity crimes. It also signals our resolve that Russia’s invasion will not undermine our collective commitment to uphold human rights and preserve a free and democratic society’.

<https://www.justice.gov/opa/pr/readout-attorney-general-merrick-b-garland-s-trip-ukraine>, (Accessed: July 1, 2023)

(Nota bene: In addition to Ukraine, Poland, Lithuania, and Eurojust, the JIT includes the ICC as a member.)

- 83 The full text of § 4 is as follows: ‘Fourth, support civilian control of the military and hold accountable those responsible for human rights violations and abuses, including those committed by non-state actors. We demand that all parties to armed conflict fully comply with their obligations under international humanitarian law including those regarding the protection of civilians, with particular consideration of populations in marginalized or vulnerable situations. We commit to fight against impunity and promote accountability for violations of international law, particularly genocide, war crimes, the crime of aggression and crimes against humanity, including where such crimes involve sexual and gender-based violence. We acknowledge the important role played by the ICC as a permanent and impartial tribunal complementary to national jurisdictions in advancing accountability for the most serious crimes under international law’.

Declaration of the Summit for Democracy, 29 March 2023, <https://www.state.gov/declaration-of-the-summit-for-democracy-2023/>, (Accessed: July 1, 2023).

- 84 See: II. Promoting peace and security:

1. Russia’s war of aggression against Ukraine

‘There can be no impunity for war crimes and other atrocities such as Russia’s attacks against civilians and critical civilian infrastructure. We further condemn the unlawful transfer and deportation of Ukrainians, including children, and conflict-related sexual violence against Ukrainians. We reiterate our commitment to holding those responsible to account consistent with international law, including by supporting the efforts of international mechanisms, in particular the International Criminal Court. We support exploring the creation of an internationalized tribunal based in Ukraine’s judicial system to prosecute the crime of aggression against Ukraine. In addition, we underscore the importance of the protection and preservation of Ukrainian cultural properties and heritage damaged and threatened by the war of aggression. [...]’

G7 Japan 2023—Foreign Ministers’ Communiqué (18 April 2023), <https://www.diplomatie.gouv.fr/en/french-foreign-policy/global-challenges/news/article/g7-japan-2023-foreign-ministers-communique-april-18-2023>, (Accessed: July 1, 2023).

- 85 https://legal.un.org/ola/media/UN-ICC_Cooperation/UN-ICC_Relationship_Agreement.pdf, (Accessed: July 1, 2023).

Nations—International Criminal Court Cooperation.⁸⁶ The latter enumerates and hyperlinks to the memoranda of understanding contracted with some UN peacekeeping missions, such as those sent to the DRC,⁸⁷ Côte d'Ivoire,⁸⁸ Mali,⁸⁹ and the Central African Republic.⁹⁰ There is also a framework agreement signed by the ICC and the United Nations Development Program.⁹¹

Enhanced co-operation has been established with two intergovernmental police organisations, namely, Interpol⁹² and Europol,⁹³ which work together with the European Union Agency for Criminal Justice Cooperation (Eurojust).⁹⁴ There ICC also has a co-operation and assistance agreement with the European Union (EU).⁹⁵ As a fervent promoter of the fight against impunity, the EU is also very active in the framework of the Common Foreign and Security Policy and of Police and Judicial Co-operation in Criminal Matters (PJCCM), the former Justice and Home Affairs (JHA) Council.⁹⁶

- 86 [https://legal.un.org/ola/media/UN-ICC_Cooperation/Best Practice Guidance for UN-ICC cooperation -public.docx.pdf](https://legal.un.org/ola/media/UN-ICC_Cooperation/Best%20Practice%20Guidance%20for%20UN-ICC%20cooperation%20public.docx.pdf), (Accessed: July 1, 2023).
- 87 Memorandum of Understanding concerning cooperation between MONUC (now MONUSCO) and the ICC (2005) <https://www.icc-cpi.int/court-record/icc-01/04-01/06-1267-anx2>, (Accessed: July 1, 2023).
- 88 Memorandum of Understanding concerning cooperation between UNOCI and the ICC (2012, 2013).
- 89 Memorandum of Understanding concerning cooperation between MINUSMA and the ICC (2014).
- 90 Memorandum of Understanding concerning cooperation between MINUSCA and the ICC (2014).
- 91 <https://www.undp.org/news/undp-and-international-criminal-court-sign-new-partnership-agreement>
- 92 Cooperation agreement between the Office of the Prosecutor and Interpol (2014), <https://www.icc-cpi.int/news/icc-cooperation-agreement-between-office-prosecutor-and-interpol>, (Accessed: July 1, 2023); <https://www.interpol.int/Who-we-are/Legal-framework/Cooperation-agreements/Cooperation-agreements-Global-international-organizations>, (Accessed: July 1, 2023).
- 93 <https://www.eurojust.europa.eu/news/eurojust-and-icc-prosecutor-launch-practical-guidelines-documenting-and-preserving-information>, (Accessed: July 1, 2023); <https://www.eurojust.europa.eu/publication/documenting-international-crimes-and-human-rights-violations>, (Accessed: July 1, 2023); ICC and Europol conclude Working Arrangement to enhance cooperation, <https://www.europol.europa.eu/media-press/newsroom/news/icc-and-europol-conclude-working-arrangement-to-enhance-cooperation>, (Accessed: July 1, 2023); <https://www.icc-cpi.int/news/icc-and-europol-conclude-working-arrangement-enhance-cooperation>, (Accessed: July 1, 2023);
- 94 <https://www.eurojust.europa.eu/news/icc-participates-joint-investigation-team-supported-eurojust-alleged-core-international-crimes>, (Accessed: July 1, 2023); <https://www.icc-cpi.int/news/press-conference-icc-prosecutor-and-eurojust-joint-investigation-team-alleged-core>, (Accessed: July 1, 2023); <https://www.eurojust.europa.eu/publication/documenting-international-crimes-and-human-rights-violations>, (Accessed: July 1, 2023).
- 95 https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/6EB80CC1-D717-4284-9B5C-03CA028E155B/140157/ICCPRES010106_English.pdf, (Accessed: July 1, 2023).
- 96 For further detail, see: Kovács, Péter: *La Cour pénale internationale et l'Union européenne: un partenariat éprouvé pour la bonne cause*, in: Barbato, Jean-Christophe; Barbou, des Places Ségolène; Dubuy, Mélanie; Moine, André (sous la dir.) *Transformations et résilience de l'Etat. Entre mondialisation et intégration: Liber Amicorum en hommage à Jean-Denis Mouton*, Paris, Éditions Pedone (2020) pp. 311–326.

The ICC also has a formalised relationship with the International Commission on Missing Persons.⁹⁷

The International Committee of the Red Cross (ICRC), a legally non-intergovernmental organisation that plays a special role in armed conflicts and related matters, entered into a contractual relationship with the ICC through the Agreement on Visits to Persons deprived of Liberty Pursuant to the Jurisdiction of the International Criminal Court.⁹⁸ The ICRC also contributes to the analysis and outreach of issues and activities under the purview of the ICC.⁹⁹

Finally, the ICC has various relationships with different NGOs and civil societies. The umbrella organisation known as the Coalition for the International Criminal Court¹⁰⁰ embraces dozens of NGOs ready to promote the ICC’s aims. Several of these organisations participated in the side events of the Rome Diplomatic Conference and the sessions of the ASP. Some NGOs or their leaders stepped up as *amici curie* during various trial and pre-trial affairs or served as legal counsels or representatives of victims. Some pro-NGO lawyers are currently acting on the side of the defence in a given case, which is the correct thing to do. Co-operation with NGOs, whether international or national, primarily manifests in the outreach of the ICC, where they facilitate the understanding of local situations, access to victims and potential witnesses, as well as reparation and assistance matters. Some have scholarly ambitions and provide analytical, critical, or easily understandable local coverage about the practices of the ICC.

2.12. Criticism (internal critics, external critics, friendly and unfriendly)

‘Nothing is perfect’, Saint-Exupéry’s fox told the Petit Prince. This is particularly true of international law in general and the ICC in particular. Like all human

97 Memorandum of Understanding between the International Commission on Missing Persons and the Office of the Prosecutor of the International Criminal Court (2016), https://www.icc-cpi.int/sites/default/files/itemsDocuments/ICC_ICMP.pdf, (Accessed: July 1, 2023).

98 https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/A542057C-FB5F-4729-8DD4-8C0699DDE0A3/140159/ICCPRES020106_English.pdf, (Accessed: July 1, 2023).

99 <https://www.icrc.org/en/war-and-law/international-criminal-jurisdiction/international-criminal-court>, (Accessed: July 1, 2023). The International Committee of the Red Cross provides a number of useful resources. See, for example: ‘Cooperation in extradition and judicial assistance in criminal matters—Factsheet’; ‘International criminal justice: The institutions—Factsheet’; ‘War crimes under the Rome Statute of the International Criminal Court and their source in international humanitarian law—Table’; ‘International Criminal Court’; ‘Issues raised regarding the Rome Statute of the ICC by national Constitutional Courts, Supreme Courts and Councils of State’; ‘ICRC and ICC: Two separate but complementary approaches to ensuring respect for international humanitarian law’; ‘Aspects of victim participation in the proceedings of the International Criminal Court’; ‘Transitional justice and the International Criminal Court—in “the interests of justice”?’; and ‘The International Committee of the Red Cross and the International Criminal Court: Turning international humanitarian law into a two-headed snake?’

100 <https://www.coalitionfortheicc.org/>, (Accessed: July 1, 2023).

creations, no international tribunal or international jurisprudence can be perfect and are subject to criticism.

Internal criticism takes the form of separate and dissenting opinions, quashing of appeal, or a new jurisprudential approach. The latter generally avoids openly criticising the previously followed line, instead emphasising the need to “distinguish” between the factual or legal context of the given decision. For example, consider the reparation decisions in the Lubanga, Katanga, Al Mahdi, and Ntaganda cases.¹⁰¹ This form of internal criticism can also be observed in the issue of how precise a confirmation of charges decision should be, such as in the Bemba appeal, Ntaganda appeal, and intermediary appeal decision in the Yekatom and Ngaïssona case, for example.¹⁰²

A special form of internal criticism may come from the ASP, which can call the judiciary and OTP to accelerate and get rid of alleged unnecessary elements during the procedure and in the decisions or submissions. A good example of this is the Independent Expert Review,¹⁰³ commissioned by the Assembly of the States Parties,¹⁰⁴ which took stock and proposed suggestions to the OTP, the Registry, and the Judiciary, respectively. The ICC is currently exploring how to realise suggestions, which

101 Judgment on the appeals against the ‘Decision establishing the principles and procedures to be applied to reparations’ of 7 August 2012, ICC-01/04-01/06-3129, 3 March 2015, <https://www.icc-cpi.int/court-record/icc-01/04-01/06-3129>, (Accessed: July 1, 2023); Judgment on the appeals against Trial Chamber II’s ‘Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable’, ICC-01/04-01/06-3466-Red, 18 July 2019, <https://www.icc-cpi.int/court-record/icc-01/04-01/06-3466-red>, (Accessed: July 1, 2023); Public redacted Judgment on the appeals against the order of Trial Chamber II of 24 March 2017 entitled ‘Order for Reparations pursuant to Article 75 of the Statute’, ICC-01/04-01/07-3778-Red, 9 March 2018, <https://www.icc-cpi.int/court-record/icc-01/04-01/07-3778-red>, (Accessed: July 1, 2023); Public redacted Judgment on the appeal of the victims against the ‘Reparations Order’, ICC-01/12-01/15-259-Red2, 8 March 2018, <https://www.icc-cpi.int/court-record/icc-01/12-01/15-259-red2>, (Accessed: July 1, 2023); Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled ‘Reparations Order’, ICC-01/04-02/06-2782, 15 September 2022, <https://www.icc-cpi.int/court-record/icc-01/04-02/06-2782>; <https://www.icc-cpi.int/court-record/icc-01/05-01/08-3636-red>, (Accessed: July 1, 2023).

102 Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III’s ‘Judgment pursuant to Article 74 of the Statute’, ICC-01/05-01/08-3636-Red, 8 June 2018, https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2018_02984.PDF, (Accessed: July 1, 2023), §§ 110, 115, pp. 38–39, 41–42; Public redacted version of Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled ‘Judgment’, ICC-01/04-02/06-2666-Red, 30 March 2021, <https://www.icc-cpi.int/court-record/icc-01/04-02/06-2666-red>, (Accessed: July 1, 2023), §§ 327–327, pp. 107–19; Judgment on the appeal of Mr Alfred Yekatom against the decision of Trial Chamber V of 29 October 2020 entitled ‘Decision on motions on the Scope of the Charges and the Scope of Evidence at Trial’, ICC-01/14-01/18-874 05-02-2021, https://www.icc-cpi.int/CourtRecords/CR2021_01142.PDF, (Accessed: July 1, 2023), §§ 39, 44, 54, pp. 16, 20, 25.

103 Independent Expert Review of the International Criminal Court and the Rome Statute System Final Report, 30 September 2020, https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP19/IER-Final-Report-ENG.pdf, (Accessed: July 1, 2023).

104 https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP18/ICC-ASP-18-Res7-ENG.pdf, (Accessed: July 1, 2023).

were largely formulated on the assumption that States are not ready to amend or change the text of the Statute. As such, it is the practice that should be modified if necessary, alongside small changes to the Rules of Procedure and Evidence and other non-statutory documents.

External criticism can be bipartite or hostile. Regardless, such criticism can be scholarly in nature or superficial and politically motivated.

Authors in both States Parties and non-States Parties have provided comprehensive and professional analyses. Those who are or were involved in conflictual situations in as NGO-affiliated persons, legal counsel, or governmental experts cover the different phases of an ICC proceeding according to the opinion of the represented or favoured side. However, the quality of articles or reports in printed and audio-visual media is very different, even within a given state, and pro-oppositional or pro-governmental media often give diametrically opposing pictures of the ICC.

In general, criticism is to be followed and understood, at least in order to realise where and how the ICC's outreach activity should be amplified or changed, if truly necessary.

2.13. Adaptationism

The Rome Statute contains three lengthy articles concerning different forms of eventual amendments.¹⁰⁵ In spite of the adoption of the definition of aggression at the Kampala Conference as well as amendments concerning the criminalisation and punishment of certain weapons and means of warfare, most of the States Parties to the Rome Statute appear to feel that no minor, major, or comprehensive review is appropriate at present. There is an impression that negotiations resulting from such reviews could open Pandora's box, potentially reducing the number of States Parties and diminishing the strength of the ICC.

This means that the necessary adaptation in answer to the experienced challenges will not be done through conventional, statutory revision, but via the modification of the legal and sometimes metalegal soft law instruments. This will be achieved through resolutions passed by the ASP¹⁰⁶ or by the decisions of the judiciary.

The Independent Expert Review proposed partly technical, partly procedural reforms that do not require modification to the treaty law of the Rome Statute.

105 Rome Statute, Article 121 Amendments, Article 122, Amendments to provisions of an institutional nature and Article 123 Review of the Statute.

106 See, for example, minor reforms as to electoral matters: i. Advisory Committee on nominations of judges of the International Criminal Court, <https://asp.icc-cpi.int/ACN>, (Accessed: July 1, 2023); ii. Due diligence process, Adopted by the Bureau pursuant to resolution ICC-ASP/21/Res.2, https://asp.icc-cpi.int/sites/default/files/asp_docs/ICC-ASP-EJ2023-DueDiligence-ENG.pdf, (Accessed: July 1, 2023); iii. <https://asp.icc-cpi.int/elections/Registrar/ER2022>, (Accessed: July 1, 2023). Regarding the review, see: i. <https://asp.icc-cpi.int/Review-Court>, (Accessed: July 1, 2023); ii. <https://asp.icc-cpi.int/Review-Court/Review-Mechanism>, (Accessed: July 1, 2023). For the Working Group on Amendments, see: <https://asp.icc-cpi.int/WGA>. Finally, regarding experiences of and problems surrounding complementarity, see: <https://asp.icc-cpi.int/complementarity>.

Such reforms have been realised in the past, including the Rules of Procedure and Evidence,¹⁰⁷ where Rule 68 on Prior Recorded Testimony was expanded to cope with challenges, such as cases where witnesses—presumably under duress or threat—refused to testify or were unable to recall what they had told the OTP previously. News about witnesses killed in road accidents or mysteriously disappearing also contributed to the unwillingness to be heard by judges. The ASP significantly amended the Rules of Procedure and Evidence, but emphasised the importance of the threat, the interest of justice, and the condition that ‘the prior recorded testimony has sufficient indicia of reliability’.

The Chambers Practice Manual¹⁰⁸ is a non-binding tool intended to facilitate a coherent and transparent jurisprudence. In 2015, the Pre-Trial Division prepared a Manual¹⁰⁹ based on the “best practices approach”, placing emphasis on different procedural time limits and suggesting a structure of different decisions, particularly those concerning the confirmation of charges. It was subsequently amended with a chapter concerning Trial chambers, and the first version of the Chambers Practice Manual was published in 2016. Since then, several addenda and changes have been introduced. The sixth version is currently applied.

The Manual, which is non-binding in nature, is generally considered a useful instrument, especially for trial lawyers working on actual cases and situations within the ICC. It is only adopted by the judiciary—that is, the common session comprising all the eighteen judges—without the need for the consent of the ASP.

It is important to mention a special institution called the Advisory Committee on Legal Texts¹¹⁰ (ACLT), which consists of (i) three judges, representing the three different judicial divisions; (ii) the representatives of the defence counsels; (iii) a senior lawyer or head of the Legal Coordination Section of the OTP and a high-ranking representative of the Registry. This body is entrusted with the technical preparation and prior analysis of the harmony of draft reforms, whether they are adopted by the judges alone (e.g. the Manual and the Regulations of the Court) or require an ASP decision according to the Rome Statute (e.g. Rules of Procedure and Evidence).

2.14. *Futurism or “long termism”?*

Is the creation of the ICC futuristic? In the previous points, I noted a good number of statutory, structural, and procedural factors that serve the aim of “putting an end

107 <https://www.icc-cpi.int/sites/default/files/2023-02/Rules-of-Procedure-and-Evidence-Dec-2022.pdf>, (Accessed: July 1, 2023).

108 <https://www.icc-cpi.int/about/judicial-divisions/chambers-practice-manual>, (Accessed: July 1, 2023).

109 [https://www.icc-cpi.int/sites/default/files/iccdocs/other/Pre-Trial_practice_manual_\(September_2015\).pdf](https://www.icc-cpi.int/sites/default/files/iccdocs/other/Pre-Trial_practice_manual_(September_2015).pdf), (Accessed: July 1, 2023).

110 <https://www.icc-cpi.int/news/presidency-announces-new-composition-icc-advisory-committee-legal-texts>, (Accessed: July 1, 2023).

to impunity”, through which creators and judicial managers – whether judges, internal advisors or prosecutors – endeavour to realise the purpose and expectations of the ICC.

However, it is not possible to fully satisfy expectations.

Using the ICJ as an analogy, the ICJ has not become the unavoidable dispute setting forum of interstate litigation. It is often said that mainly small or relatively weak states have brought their cases before the ICJ, while great powers have tended to neglect it or tried to avoid its jurisdictional competences through the wisely formulated sub-conditions of their unilateral declarations recognising the jurisdiction of the Court as compulsory. Nevertheless, even the greatest countries are occasionally litigants and the ICJ has pronounced judgments obliging them to act in conformity with international law commitments. However, the main and incontestable output of the ICJ is their role in the uniform interpretation of international law in university teaching and scholarly analysis, which helps governments act accordingly.

Something similar can be said about the ICC.

The jurisprudence regarding international criminal law as developed by the international military tribunals of Nuremberg and Tokyo, the ICTY and ICTR, the hybrid tribunals, and the ICC has been integrated into the curriculum of law faculties and military and police academies. Even if they result in a relatively low number of investigated, charged, and finally condemned people, the ICC’s activities and selection of cases demonstrate how national prosecution could act in time to prevent atrocities and, should they occur, how to investigate and punish the perpetrators and secure reparation and assistance to the victims.

States were absolutely right when they decided on its establishment and despite the difficulties and challenges it faces, the ICC will fulfil its mandate. The ICC is the long-term realisation of a common aim, the pursuit of which does not preclude necessary continuous adaptation through reforms and amendments formulated following careful review.

The ICC is serving the present and the future. It is not futuristic, it is realistic. It is equipped with high level technical facilities, which is not only useful in its day-to-day work but also helps the outside world, national ministries, the judiciary, academia, law firms, and the media in keeping apprised of and following its work. The transparency of judicial cases at the pre-trial and trial level facilitates the understanding of the functioning of the ICC and its institutions. It serves the long-term interests of mankind.

3. Conclusions

As the recently-deceased Benjamin Ferencz¹¹¹ told the Hague,
*The ICC, as the court of last resort in a state-dependent system of international justice, offers hope to many who have no hope that their voices will be heard—that they have not been forgotten, and that they are not alone. [... The] protection of human rights demands deterrence of human wrongs, and all nations should strongly support the Court's efforts in helping to end impunity for crimes of the gravest concern to all humankind. [...] Now approaching my 102nd year, I have cherished the goals for which the ICC stands throughout my entire adult life and I give thanks for the torch-bearers who will carry the dream of a more humane world under the rule of law forward, lest we perish from the folly of our failure to do so.*¹¹²

It would be difficult to find a better way to express how the interrelationship between endeavours, challenges, state obligations, and so many individuals' devoted professional work characterises the ICC, which is sailing not between Scylla and Charybdis, but between aims and realities.

111 Statement of the International Criminal Court on the passing of Benjamin B. Ferencz, <https://www.icc-cpi.int/news/statement-international-criminal-court-passing-benjamin-b-ferencz>, (Accessed: July 1, 2023).

112 Benjamin B. Ferencz receives Distinguished Honorary Fellowship of the International Criminal Court, <https://www.icc-cpi.int/news/benjamin-b-ferencz-receives-distinguished-honorary-fellowship-international-criminal-court>, (Accessed: July 1, 2023).

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CHAPTER 2

FROM NUREMBERG TO THE HAGUE: THE NOVELTIES OF ESTABLISHING THE PERMANENT INTERNATIONAL CRIMINAL COURT



MILAN ŠKULIĆ

Abstract

The chapter outlines the basic features of the development of international criminal law and international criminal justice, with a special emphasis on the establishment of the permanent International Criminal Court, which the author has treated as a new beginning rather than the end of the development of international criminal justice.

The author has also provided an overview of the history of international criminal justice, closely associated with the history of civilisation, military history for the most part, covering the fundamental stages thereof – its “juvenility”, so to speak, the landmark Nuremberg Trials and the other tribunals since World War II.

The main point is that when it comes to the future of the International Criminal Court, one should be neither an optimist nor a pessimist, and for what lies ahead of the first permanent form of international criminal justice, the old truth holds that a glass halfway filled with water may be seen as either half-full or half-empty.

Keywords: International Criminal Law, International Criminal Justice, Nuremberg, IMT, Permanent International Criminal Court, ICC

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1. Introduction – the Dominant Influence of Historical Circumstances on the Development of International Criminal Law

The general history of mankind is, for the most part, the history of war, which, coupled with the fact that in a war, war crimes and other international crimes are inevitable, postulates a dominant link between major historic events, the defining moments in the history of war in particular, and specific international criminal trials. The history of international criminal justice is very closely connected to the war/military/general history of mankind/human society.

International criminal justice has not evolved in a straight line, but rather through a series of legal and occasionally paralegal cases, developing under specific historical circumstances. The historical circumstances, and above all the great divide between victors and defeated in war, were, among other things, the key to whether a trial would be pursued after the war at all, who would be tried and often how a trial would be conducted.

2. The Beginnings of International Criminal Justice – the Juvenile Stage

One of the important historic moments in this context is the trial in Breisach of the Duke of Burgundy, Sir Peter von Hagenbach, in 1474. As the governor of an occupying power, Hagenbach was charged with a number of crimes – murder, rape and confiscation of private property. The citizens of Breisach established a “multinational tribunal” of 28 judges, eight nominated by Breisach, and two by each of the other nearby regions. Hagenbach pleaded superior orders, arguing that he had only carried out commands, but was nevertheless found guilty, sentenced to death and executed.¹

Some authors suggest that the “war crimes trial” of Conradin von Hohenstaufen, in Naples in 1268, might be one of the harbingers of an international criminal court.² That trial cannot be considered a credible international criminal trial, particularly in the light of the currently prevailing concepts.

1 Bring, 2001, p. 11.

2 Bassiouni, 1999, p. 3.

3. The First Valid Concepts of an International Criminal Court as a Manifestation of “Universal Justice”

The idea of an international war crimes court, unrestrained by state borders and prompted to act by the failure of a national judiciary to prosecute, was explicitly articulated in the second half of the nineteenth century. The outbreak of the Franco-Prussian War (1870-1871), one of the first modern wars, saw many acts of barbarism. Gustave Moynier of Switzerland, the then president of the International Committee of the Red Cross, appalled by these atrocities, proposed that an international criminal court be established as a response to the crimes.

4. Attempt at Trying the German Emperor after World War I, and the Right of Victorious Powers to Prosecute

The Treaty of Peace with Germany signed in Versailles prescribed that the former German emperor should be called to account for ‘a supreme offence against international morality and the sanctity of treaties’, and that ‘a special tribunal will be constituted to try the accused’, but this never materialised, because the Netherlands, where the former monarch, Kaiser Wilhelm II, lived in exile, refused to extradite him. The attempt to place the former German emperor on trial is believed to be one of the first cases that took ‘international individual criminal responsibility’ for violating ‘the rules of international customary law of war’ into consideration.³ One of the key points of this theoretical approach is that public international law does not provide for an opportunity to punish a state in terms of criminal law, which is based on the “concept of personal guilt”, and the first attempt at punishing an individual directly based on the rules of international law was made against Kaiser Wilhelm II after World War I.⁴

Under Article 227 of the Treaty of Versailles, the former German monarch, the commander-in-chief of Germany’s military forces, was also charged with command responsibility in relation to the crimes committed by members of his armed forces. The literature suggests that a trial of the former German emperor would have been a “victor’s trial” of the defeated. Aside from Wilhelm II, the list of major criminals included Theobald von Bethmann Hollweg, the chancellor of the German Empire (1909-1917), a German field marshal, Paul von Hindenburg, and General Erich Ludendorff. Under the Law to Prosecute War Crimes and War Misdemeanours passed by Germany’s Weimar government on 18 December 1919, nine former members of

3 Malekian, 1999, p. 162.

4 Buergethal, Doebling, Kokott, and Maier, 2000, p. 160.

the German Army and Navy were tried for war crimes in Leipzig; all were acquitted, largely due to insufficient evidence.⁵ Meanwhile, in other countries, especially in France and Belgium, several trials were held *in absentia* of members of the defeated German army, and sentences were passed, even death by hanging, but these sentences were never carried out.⁶ This drastic disproportion in the decisions of different national courts in criminal cases that were practically identical clearly highlights major problems in the creation of universal international criminal law and, especially on the practical level, two basic and very characteristic features can be seen: whereas a national judiciary, as a rule, is not ready to prosecute its compatriots in a realistic and impartial manner, even when it comes to the most serious international crimes, they are often quick to impose harsh punishments on members of the opposing side.⁷

The Treaty of Versailles, *inter alia*, provided an opportunity for the victorious Allied Powers to bring members of the defeated powers in World War I before their military tribunals, which was attempted with respect to persons who had held high-ranking offices in the German Empire (even the highest-ranking), but all those efforts eventually failed.

5. The Activities of International Organisations between WWI and WWII and an Unsuccessful Attempt at Establishing an International Criminal Court against Terrorism

The interwar period saw a flurry of activities by international organisations to support the development of international criminal justice, spearheaded by two inter-governmental bodies, the League of Nations and the Inter-Parliamentary Union. The drive also involved two professional organisations in the domain of criminal law, the International Law Association and the International Association of Penal Law/ Association Internationale de Droit Pénal.

One of the central issues many expert bodies focused on in the interwar years was the effect of the principle *nullum crimen, nulla poena sine lege*.⁸ Scholars generally take the view that 'efforts towards the establishment of a permanent international criminal court were initiated by the League of Nations, and continued by the United Nations, the work of the latter developing along two paths – codification of

5 Wakaki, 1996, p. 13.

6 Ibid.

7 Although only a few individuals were indeed sentenced in Leipzig to relatively short terms of imprisonment, the sentences had a precedent character, as a soldier who has committed a war crime could no longer invoke the protections afforded by the Hague Conventions that the state is responsible for the acts of a soldier who has violated the laws of war.

8 Ahlbrecht, 1999, pp. 46–53.

international criminal offenses and the elaboration of a draft statute for the establishment of an international criminal court'.⁹

Some of the roots of international concern with the problems of terrorism and terrorist activity were identified in the first half of the 20th century, even though then the latter was typically manifested in assassinations (such as the assassination of King Alexander of Yugoslavia), and no one at the time imagined that terrorism could produce a massive number of victims.

During the Conference on the Fight against Terrorism in Geneva, on 16 November 1937, two conventions were passed, the Convention on the Prevention and Punishment of Terrorism (*"pour la prevention et la repression du terrorisme"*), and the Convention for the Creation of an International Criminal Court to try terrorists (*"pour la creation d'une Cour pénale internationale"*), and the general purpose of the conference was 'the fight against politically motivated terrorism'.¹⁰

The contemporary international community attempted to use the convention on the establishment of an international criminal court against terrorism to create effective international criminal justice (albeit with a quite narrowly defined jurisdiction), but the idea never came to life, as the Italian invasion of Abyssinia meant the initiative was nipped in the bud. Formally, neither of the two conventions even started to produce legal effects. It is also important to note that at that time, the global political climate was not at all favourable for bringing the idea to life effectively.

6. The Nuremberg/Tokyo War Crimes Trials

In the wake of the previous "unsuitable" efforts to create a viable international criminal court came what appears to have been a truly decisive step – the establishment of the International Military Tribunal (IMT) in Nuremberg to prosecute and punish the major war criminals of the defeated European Axis powers, and its Asian counterpart, the International Military Tribunal for the Far East in Tokyo.

Certain political deals that had been reached during World War II paved the way for the Nuremberg Trials, as the necessity to try those responsible for serious crimes had already presented itself. In October 1941, U.S. President Franklin Roosevelt and British Prime Minister Winston Churchill reached an agreement on a large-scale trial of Nazi leaders to be held in the future, and during the Moscow Conference in October 1943 a joint declaration was signed by Roosevelt, Churchill and Stalin, seen as the source of the Nuremberg Trials.¹¹

9 Bassiouni, 1998, pp. 10–11.

10 Ahlbrecht, 1999, p. 57.

11 Möller, 2003, p. 75.

The Charter of the International Military Court in Nuremberg was based on the London Agreement of 8 August 1945, an intergovernmental agreement between the four principal Allies to secure the prosecution and punishment of the major war criminals of the European Axis powers.¹²

It goes without saying that the trials in Nuremberg and Tokyo were of enormous importance, and it cannot be denied that members of the Axis Powers committed horrific crimes during World War II, but against the backdrop of common legal reasoning and standard evidentiary parameters, they were less than perfect. Yet the two trials still provide a starting point for most of the expositions of the roots of international criminal courts, and the experience arising from their operation is essential in analysing the case law of international criminal courts.

They also constitute a rare historical example of how, in some respects, the principle of legitimacy may prevail over the formal principle of legality.¹³ The Nuremberg Trials were conceptually intended to be a kind of great “lesson”, both to the German people in the process of legal and factual denazification, and to potential future “ignitors of the world war conflagration”, which was basically the essential reason why none of the decision makers at that time were excessively concerned with “excessive legal formalities”. This is also the reason why the Nuremberg Trials were completely legitimate, despite the fact that, formally, the main actor in the judiciary function was the IMT composed of representatives of the four Allied Powers and which was not based on any possible broader international legal basis. Besides, no one could seriously object that the IMT lacked international legitimacy. For example, in a famous classic early work from the very extensive literature devoted to that famous trial, it is emphasised: “The endless devastation and indescribable mass horrors that accompanied the war, as well as the growing realization that a subsequent war might bring about the end of modern civilization, contributed to the fact that the whole world demanded the condemnation and punishment of those responsible for the aggressive war and the horrors of war”.¹⁴

The gravity of the crimes committed during World War II by Nazi Germany was enormous, previously unseen and unrecorded in history, making it quite pointless to insist on respecting all “formal” requirements. This especially applied to crimes against peace, because the commission of that act, that is, the initiating of a war of aggression, was effectively the trigger for all subsequent crimes committed during the war and within its framework. The Nuremberg Trials, or rather the legal basis for the convictions of the defendants in that proceeding formed in the Charter of the IMT, represent a historically exceptional and extremely rare case, which may probably occur “once in a thousand years”, in which the principle of legitimacy, based on the necessity that the perpetrators of the most serious and hitherto unprecedented

12 Jescheck, 2004, p. 38.

13 Škulić, 2022a., p. 20.

14 Taylor, 1951, p. 11.

mass crimes be justly punished, absolutely and justifiably prevails over the principle of legality.

6.1. *The Nuremberg Trials*

The principles of criminal law as adopted in Nuremberg formally became the core of international criminal law when, at the first session of the General Assembly of the Organisation of the United Nations, Resolution 95 adopted on 11 December 1946 affirmed them, thus making them the foundation of international criminal law. As a former British chief Prosecutor at Nuremberg said: ‘The West German government has finally, with the extreme awareness of responsibility, dealt with the problem of war crimes, and the West German judiciary has applied the Nuremberg Principles in a series of cases’.¹⁵ The Nuremberg Trials/rules became the cornerstone in the development of international criminal law.

The IMT in Nuremberg adopted a modified Anglo-Saxon criminal law procedure. Chief Prosecutor Jackson said: ‘The only problem was that a procedure that is acceptable as a fair trial in countries accustomed to the Continental system of law may not be regarded as a fair trial in common-law countries’.¹⁶

The trial of those seen as “major war criminals” began on 18 October 1945 in Berlin, and as of 20 November 1945 continued in Nuremberg, where between 30 September and 1 October 1946 the Judgement was pronounced and published; it included 12 death sentences, three life sentences, three prison sentences, and three acquittals.¹⁷

In addition, certain German organisations (i.e. legal persons acting as collectivities) were declared criminal, namely the SS (*Schutzstaffel*, the elite paramilitary wing of the German Nazi party), the SD (*Der Sicherheitsdienst*, the German security service), the Gestapo (*Geheime Staatspolizei*, secret police), and the NSDAP (*Nationalsozialistische Deutsche Arbeiter Partei*, the Nazi party).¹⁸ Membership therein was not treated as a delict in the context of criminal law, but it was a basis for the so-called denazification procedure, which effectively narrowed, or in some cases denied, otherwise guaranteed civil rights for a certain period of time, banned the exercise of certain duties and offices, and imposed special obligations.

15 Gründler and Manikovsky, 1967, p. 13.

16 Bassiouni, 1992, p. 21.

17 In his dissenting opinion, the Soviet member of the IMT, Judge Nikitchenko, stated that three acquittals and a life sentence for Rudolf Hess were unfounded, arguing that the three acquitted defendants should have been sentenced and that the only justified sentence for Hess was death. The Soviet judge also maintained that the General Staff and the supreme military command, Oberkommando der Wehrmacht (OKW), should have been declared criminal organisations. See more: Maser, 1977, pp. 295–297.

18 Ahlbrecht, 1999, p. 93.

6.2. *The Tokyo Trial*

Compared to the trials at Nuremberg, the Tokyo War Crimes Trial is referenced less frequently in studies of international military criminal courts after World War II. One of the reasons might be the physical distance from Europe, which many considered the place where the war began and actually ended, even though it was effectively ended some time later in the Far East. The IMT for the Far East was established on 19 January 1946 and was focused on the war crimes that affected the Allies most strongly – war crimes against prisoners of war, in which the Japanese had broadly engaged.

The Tribunal was established by the Tokyo Charter, actually a decree issued by General Douglas MacArthur, following a blueprint developed by a U.S. lawyer, Joseph Keenan, who was later appointed as the Tribunal's chief Prosecutor. Certain differences notwithstanding, the rules applied by the IMT in Tokyo were quite similar to those used at Nuremberg. The Tokyo court found all the defendants guilty, and seven were sentenced to death.

7. *Ad hoc* International Criminal Tribunals after WWII

The international criminal tribunals for the former Socialist Federative Republic of Yugoslavia and for Rwanda were established based on resolutions of the United Nations Security Council, since they commenced their operations, this fact has formed the basis for contesting their legality.¹⁹

There are fairly strong arguments that can be used to challenge this legality, but in terms of facticity, the work of the two tribunals in the given time is no longer disputatious, which, given the gravity of the cases before them and the considerable weight of the current and potential consequences of their decisions, cannot and must not be ignored.

As to the impact of *ad hoc* international criminal tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) on the development of international criminal law, scholarly analysis suggest that in some situations, the case law developed in proceedings before these criminal tribunals influenced comparable solutions in the Rome Statute of the International Criminal Court. In other aspects, however, the opposite was the case, and it contributed to the development of completely different normative solutions in that Statute.²⁰ To illustrate the former, the Statute prescribes

19 The literature says: “The Charter of the United Nations does not provide legal grounds for the establishment of an international criminal court”. The establishment of an international tribunal by the U.N. Security Council was a new legal realm”. See more: Satzger, 2018, pp. 155–156.

20 Schabas, 2017, pp. 12–13.

that a crime against humanity (contrary to the case law developed at Nuremberg) may be committed in peacetime as well as in war or during an armed conflict, whereas the latter effect is confirmed by the failure to integrate the Hague Tribunal's case law excluding coercion as possible grounds for the exemption from illegality/criminal responsibility in the rules of the Statute.²¹ Even though the case law of the two *ad hoc* international criminal tribunals definitely affected the development of international criminal law, their influence should not be overestimated.

There are also specific international criminal courts/tribunals that are hybrid in their nature. In the theory of international criminal law, these tribunals are also referred to as “mixed”, emphasising that they arise as a consequence of the ‘internationalization of criminal prosecution for serious human rights violations’.²² A typical example of hybrid international criminal courts/tribunals are the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia.²³ The U.N. and the Sierra Leone government jointly established the Special Court for Sierra Leone in 2002, with the mandate to try persons bearing the greatest responsibility for serious violations of both international humanitarian law and Sierra Leonean law, committed in the territory of Sierra Leone since 30 November 1996.²⁴ The Extraordinary Chambers in the Courts of Cambodia was established in 2004, through an international agreement between the U.N. and Cambodia, to try persons responsible for crimes committed under the Khmer Rouge regime from 1975 to 1979.²⁵

There is a tendency in the theory of public international law, also dealing in part with international criminal law, that all criminal courts and tribunals before which international crimes are prosecuted, as well as certain forms of their specialised jurisdiction, should be defined as forms of international criminal justice, or more precisely of criminal justice involving an appropriate “international law component”. Accordingly, the “international criminal courts and tribunals” include the ICTY and ICTR, and in connection with these two, the International Residual Mechanism for Criminal Tribunals. They also include the permanent International Criminal Court (ICC) and a special category of ‘hybrid courts and other internationalised domestic courts and tribunals’, namely, the Special Tribunal for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, participation of international judges

21 Ibid.

22 Ambos, 2018, p. 146.

23 Hybrid tribunals are treaty-based courts, with a combination of national and international elements, created through an agreement between a national governments and an international organisations, such as the United Nations. They are mostly locally based courts, created to deal with serious international crimes and generally feature both international and national judges. Some are practitioners, but investigators and prosecutors are also involved in the hybrid tribunals. Besides the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia already mentioned, the Special Panels and Serious Crimes Unit in East Timor, Special Tribunal for Lebanon, Extraordinary African Chambers and Kosovo Specialist Chambers and Specialist Prosecutor's Office are also considered to be hybrid international criminal courts/tribunals.

24 Schabas, 2017, pp. 12–13.

25 Ibid.

in criminal proceedings in Kosovo and Metohija under the UNMIK rules established in 2000 based on the U.N. Security Council Resolution 1244 (UNMIK Regulations 64 Panels, 2000/64), Special Panels for Serious Crimes in East Timor, panels involving international judges in war crimes proceedings in Bosnia and Herzegovina, the Special Tribunal for Lebanon, the Iraqi High Tribunal and specialised war crimes chambers in Serbia.²⁶

8. Permanent International Criminal Court as a Potential New Beginning, rather than the End of the Development of International Criminal Justice

After a series of unsuccessful efforts to act upon the principles of *ad hoc* tribunals, a large part of the international community managed to establish a permanent international criminal court. The adoption of the Rome Statute and other sources of law applied in the proceedings before the permanent ICC created the necessary normative requirements for further and better aligned development of international criminal law. Prior to the establishment of the Court, it had not possessed secure and stable sources, and, having relied until then on temporary judicial bodies, had itself assumed an *ad hoc* character. Consequently, many solutions in international criminal law depended directly on the actors involved in the criminal proceedings, above all the judges, charged with rendering judgements.

The Court was established by a multilateral international treaty, the Rome Statute, in July 1998. Having been ratified by more than sixty countries, the Rome Statute entered into force on 1 July 2002. It was not until the Rome Statute took effect that the factual and normative conditions were met to produce a reasonably simple codified criminal law of international character that was easier to implement. More precisely, the sources of this law are now largely unified and coherently summarised by the ICC Statute and other sources, including the Rules of Procedure and Evidence and the Elements of Crimes.

To sum up, the activity of the ICC should be perceived as a completely new beginning for international criminal law. It would be wrong, of course, to deny the importance of the case law already created in international criminal law, but it should not be overestimated either, much less given a dominant role, as it came into being under considerably different normative conditions.

26 Shaw, 2014, pp. 286–309.

8.1. Jurisdiction of the International Criminal Court

The types of jurisdictions of the ICC are: (1) subject-matter jurisdiction, (2) territorial jurisdiction, (3) personal jurisdiction, and (4) temporal jurisdiction.

The ICC has jurisdiction over ‘the most serious crimes of international concern’.²⁷ The international crimes within the subject-matter jurisdiction of the ICC are 1) genocide, 2) crimes against humanity, 3) war crimes, and 4) the crime of aggression. The crime of aggression had not been defined by the Rome Statute or the Elements of Crimes (a complementary source of substantive criminal law used with the Statute) for a long time, which produced a rather awkward situation in that part of the subject-matter jurisdiction of the permanent ICC was impossible to exercise effectively under any conditions, reducing it to a mere norm. Resolution RC/Res.6, adopted at the 13th plenary meeting of the ICC Review Conference in Kampala, on June 11, 2010, finally defined the crime of aggression within the meaning of the Statute.

The ICC may exercise jurisdiction over the international crimes within its subject-matter jurisdiction only if they were committed on the territory of a State Party or by one of its nationals. These basic rules of territorial and personal jurisdiction arise from the nature of the Rome Statute, which is an international treaty and, in accordance with Article 34 of the 1969 Vienna Convention on the Law of Treaties, is capable of binding only contracting parties.²⁸ It cannot bind third states without their consent. These conditions, however, do not apply if a situation is referred to the Prosecutor by the United Nations Security Council, whose resolutions are binding on all UN member states,²⁹ or if a State makes a declaration accepting the jurisdiction of the ICC.³⁰

The personal jurisdiction of the ICC extends only to natural persons, if they were at least 18 years of age at the time of the alleged criminal offence, who committed some of the international crimes within the subject-matter jurisdiction of the ICC regardless of where they are located or where the crimes were committed, if they are nationals of either (1) states that are party to the Rome Statute or (2) states that have accepted the Court’s jurisdiction by filing a special declaration with the Court. But, as with territorial jurisdiction, the personal jurisdiction can be expanded by the United Nations Security Council if it refers a situation to the ICC.

27 Cryer et al., 2010, p. 150.

28 Bantekas and Nash, 2003, p. 377.

29 In that situation, the territorial jurisdiction is defined by the Security Council, and it may be more expansive than the typical territorial jurisdiction of the ICC.

30 For example, Ukraine was not a state party to the Rome Statute, but that state has twice exercised its prerogatives, rights and legal possibilities to accept the Court’s jurisdiction over alleged crimes under the Rome Statute occurring on its territory, pursuant to article 12(3) of the Rome Statute. The first Ukrainian declaration accepted ICC jurisdiction with respect to alleged crimes committed on Ukrainian territory from 21 November 2013 to 22 February 2014, and the second declaration extended this time period on an open-ended basis to encompass ongoing alleged crimes committed throughout the territory of Ukraine from 20 February 2014 onwards.

The ICC's temporal jurisdiction is the time period over which that Court is able and authorised to exercise its powers. Although no statute of limitations applies to any of the international crimes within the ICC's subject-matter jurisdiction, persons can only be prosecuted for the crimes prescribed in the Rome Statute, that is, within the ICC's subject-matter jurisdiction, if these crimes took place on or after 1 July 2002, which is the date that the Rome Statute entered into force. If a concrete state became party to the Rome Statute and therefore a member of the Court after 1 July 2002, then the ICC cannot exercise jurisdiction prior to the membership date for certain cases, that is, over crimes that took place in that state or were committed by a national of that state before that state became party to the Rome Statute and a member of the ICC.

8.2. Principle of complementarity in the Rome Statute

Contrary to the rules of the *ad hoc* international criminal tribunals exercising primary jurisdiction, or rather having a formal advantage over national judiciaries with respect to the crimes falling within their jurisdiction, the principle of complementarity mandates that the primary jurisdiction lies with the national criminal justice system of a state whose bodies are establishing the jurisdiction, and criminal proceedings will only develop before the ICC due to the absence of necessary conditions or the relevant will for criminal prosecution to be conducted "on the national level".

In other words, the national criminal courts have primary jurisdiction here, and the ICC has only a subsidiary jurisdiction. The ICC's role is to complement rather than replace national courts, and it can only act when national courts have been found unable or unwilling to try a case. The first aspect of the principle of complementarity has two basic effects – one, to regulate a potential conflict of interests between national criminal courts and the ICC, and the other, to define which criminal law will apply as the primary one.

In terms of both effects of the first aspect of the principle of complementarity, the national criminal justice system and national criminal law shall enjoy an advantage, which is an excellent example of respect for the principle of state/national sovereignty in the Rome Statute. It is only logical though, as the Statute is a multinational (intergovernmental) treaty established, just like any other treaty, by a consensus reached by the member states/parties.

The other aspect of the principle of complementarity is essentially the request for adequate complementarity and correlation between the content of the Rome Statute, primarily the content of the material criminal law provisions therein, and the corresponding segments of the national criminal law of the State Parties to the Rome Statute. This is not to be interpreted as requiring the existence of norms absolutely identical to those prescribed by the Statute and other sources of law applied before the International Criminal Court, but that the substantial content of the relevant norms of national criminal law should be similar to a necessary degree. In other words, there should not be legal voids in national criminal legislation with respect to the demands of the Rome Statute.

8.3. The principle of *ne bis in idem* in the Rome Statute

The principle of *ne bis in idem* (the prohibition of double jeopardy) means that no one shall be tried twice for the same criminal offence. The Rome Statute contains the *ne bis in idem* principle as one of the aspects of complementarity insofar as, on the one hand, it pertains only to the crimes falling within the jurisdiction of the ICC (Article 5 of the Statute), and on the other, it is established as a rule to which certain exceptions are permitted. However, there is also a stricter form of this principle that acts in absolute terms, or rather, exclusively as a rule, without any exceptions.

The principle of *ne bis in idem* applies absolutely to the decisions of the ICC, and to the decisions of national courts, but with some possible exceptions. In the Statute, the principle also defines the relationship between national judiciaries, or rather, specific decisions made by national courts and their legal effect, and the Court's decisions.

Perceived from a legal and technical point of view, and given the scope of the *ne bis in idem* principle and the goal orientation thereof, the Statute has defined the principle with respect to potential new proceedings in a number of contexts: a) proceedings before the ICC where a specific defendant has already been the subject of criminal proceedings before the ICC; b) cases where a defendant has already been the subject of criminal proceedings before another court but where certain abuses or anomalies have been identified; and c) proceedings before another court where the ICC has previously conducted criminal proceedings and made a decision.

Owing to this normative solution, provided by Article 20 of the Rome Statute, it is possible to differentiate between three modalities of the effect of the *ne bis in idem* principle. The first modality is regulated by Article 20, paragraph 1 of the Statute, prescribing that no person shall be tried before the Court with respect to "conduct" which formed the basis of crimes for which the person has been convicted or acquitted by the Court (procedural rule), save the cases prescribed by the Statute (procedural exception).

The other modality of the effect of the *ne bis in idem* principle has been defined by Article 20, paragraph 2 of the Statute, mandating that no person shall be tried by another court for a crime referred to in Article 5 for which that person has already been convicted or acquitted by the Court. The second modality is prescribed only as a rule, and the Statute does not provide for the existence and effect of an exception. The third modality of the procedural and legal effect of the principle of *ne bis in idem* is regulated by Article 20, paragraph 3 (a) and (b) of the Rome Statute, and stipulates that no person who has been tried by another court for conduct also prescribed under Articles 6, 7, 8 or 8bis of the Statute shall be tried by the ICC (rule) with respect to the same conduct, unless proceedings before another court were conducted to achieve some of the alternatively prescribed goals, involving abuse or gross error, a) for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court, or b) when the proceedings in the other court were not conducted independently or impartially in accordance with the norms

of due process recognised by international law, and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

8.4. Stages of Proceedings before the International Criminal Court

Criminal proceedings before the ICC can be divided by the instance into (a) regular course of proceedings including (1) first-instance and (2) second-instance criminal proceedings, and (b) extraordinary course of proceedings, including a procedure for extraordinary legal remedy – revision – which is a type of repeated criminal procedure, that is, deciding again a criminal case in which a final decision has previously been made.

The regular course of proceedings is not completely mandatory, because the first-instance procedure will always take place (though not necessarily all its stages), whereas the second-instance proceeding are only possible, not mandatory. The first-instance proceedings will always be conducted because the proceedings, as also accepted in national criminal proceedings, may be ended at any stage before they have been completed.

The second-instance proceedings, following an appeal, are not conducted automatically, just as the revision procedure is not. Instead, the second-instance proceedings depend on the will of the parties, or rather, the existence of procedural requirements for the activation of the Court's second-instance jurisdiction, that is, the jurisdiction of the Court over extraordinary legal remedies. These proceedings will be conducted only if regular or extraordinary legal remedies have been sought, depending on the will of the parties. Given that the reasons for revisions have been quite narrowly defined, the proceedings will be conducted only if such extraordinary circumstances exist.³¹

First-instance criminal proceedings before the ICC involve the following basic procedural stages: (1) an investigation, falling within the purview of the Prosecutor, (2) filing charges, and (3) trial and judgement.

The investigation is preceded by initiating a criminal prosecution, meaning that the case is referred to the Prosecutor to take certain preliminary investigative actions; certain judicial control mechanisms exist in these procedural stages. The referral of a case to the Prosecutor constitutes the procedural initiation of the conduct of criminal proceedings, and primarily concerns the parties involved. However, the investigation is the first stage that falls within the specific authority of the Prosecutor.

To open an investigation, the Prosecutor must conclude after a preliminary examination that the alleged crimes are of "sufficient gravity". There are two ways to initiate this procedure: (1) a State Party refers a case to the Prosecutor, and (2) the U.N. Security Council refers a case to the Prosecutor.

31 Škulić, 2022b, p. 674.

The Court may exercise its jurisdiction with respect to a crime referred to in Article 5 in accordance with the provisions of this Statute if: (a) A situation in which one or more of such crimes appear to have been committed is referred to the Prosecutor by a State Party in accordance with Article 14; (b) A situation in which one or more of such crimes appear to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations [Article 13 (1) (a) and (b)]. In addition, the Prosecutor may decide to start an investigation on his own initiative (*proprio motu*).

The Prosecutor may initiate investigations *proprio motu* on the basis of information about crimes within the jurisdiction of the Court (Article 13 (1) (c) and Article 15 (1)). Bringing charges implies judicial control thereof and confirmation of the charges by the Court. The trial, as the most important and final stage of the proceedings, culminates by delivering a first-instance judgement. Depending on whether the accused has made an admission of guilt or pleaded not guilty, the type of proceedings to be conducted during the trial shall be specified.

It is possible for a person who is not a national of a State Party to the Statute to have the status of the accused before the ICC. This is possible 1) if the alleged criminal offences have been committed in the territory of a State party to the Rome Statute, 2) if a state that is not a party to the Rome Statute accepts on an *ad hoc* basis the jurisdiction of the Court, as is the case now in Ukraine, and 3) if proceedings have been launched at the initiative of the Security Council.

The Rome Statute and the Rules of Procedure and Evidence have explicitly prescribed only three measures to secure the presence of the accused during the criminal proceedings before the ICC: (1) a summons, (2) an arrest warrant and (3) detention. An arrest warrant is not an independent coercive measure, as it fails to secure the presence of the accused alone, but the logic of things is that a remand in custody will be ordered. A summons is actually the measure most likely to secure the presence of the accused, which goes for proceedings before the ICC as well, even though the matter is not regulated strictly by the sources of law for that procedure, nor is a summons defined as the first routine measure to secure the presence of the accused, as it usually is under national legislations.

The first measure is a warrant for arrest, and a summons to appear is referred to as a substitutive procedural coercive measure. In other words, instead of a request for the issuance of an arrest warrant, the Prosecutor may ask the Pre-Trial Chamber to issue a summons. At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest (Article 58, paragraph 1). As an alternative to seeking an arrest warrant, the Prosecutor may submit an application requesting that the Pre-Trial Chamber issue a summons for the accused to appear (Article 58, paragraph 7).

9. Conclusion – the Future of the International Criminal Court

The creation of the ICC, as well as the performance of the bodies proceeding before the Court, the Prosecutor in the first place, give hope that international criminal law may play an important role in the struggle against war crimes and other international crimes, though excessive optimism does not seem to be justified.

Engagement with the ICC has mostly involved African states and the results have often been quite ineffective. In addition, when it comes to armed conflicts still in progress, it may even create a “peace versus justice” collision, urging a kind of compromise between the two values. The criminal proceedings before the ICC that involved heads of states and other senior officials from various African states sparked objections regarding selective justice in the continent, and some states, including the Republic of Burundi, The Gambia, South Africa and even the Philippines (not an African state) decided to revoke their accession to the Rome Statute.

Ever since the ICC opened its doors, the major objection to that form of international criminal justice has been that major powers have not acceded to the Statute, namely the United States, China and Russia. Their restraint is actually quite logical, because it is difficult to imagine a war without the occasional war crime – there are always people with psychopathic traits (including members of the military) prepared to commit crimes in the circumstances permitted by a war.

In addition, the very concept of command responsibility, which in some of its forms is very close to objective responsibility, is a serious threat to military commanders, whereas some broader categories of complicity with far-reaching effects, including the concept of conspiracy, may lead to the criminal responsibility of persons very far away from the actual perpetrators of war crimes and other international crimes under the subject-matter jurisdiction of the ICC.³² Accordingly, those

32 Command responsibility, as defined in the Rome Statute, is a form of criminal liability that belongs to the general part of criminal law. In some countries, however, also parties to the Rome Statute, command responsibility is defined in a separate part of the criminal law as a specific criminal offence of *omission*. This is the case, for example, in Serbia when it comes to the criminal offence of failing to prevent the commission of crimes against humanity and other goods protected by international law, as well as in Germany, which in its International Criminal Code (*Völkerstrafgesetzbuch* – *VStGB*, § 4) prescribes the criminal offence of liability/responsibility of a military commander and other superiors (“*Verantwortlichkeit militärischer Befehlshaber und anderer Vorgesetzter*”). Such a definition of command responsibility as a special type of crime, and not a special form of responsibility, is possible in accordance with the principle of complementarity, but the essence is the same and boils down to the responsibility of the commander for failing to take the necessary measures to prevent certain types of crimes (genocide, war crimes, crimes against humanity) being committed. For more, see Škulić, 2004, p. 228.

The fundamental potential problem with command responsibility is that it equates a negligent failure to prevent a crime or report its perpetrator with the intentional commission of a crime that has not been prevented or reported. In other words, the failure of the commander can be intentional or negligent, and then when it comes to negligence, such a form of responsibility is certainly not

states that possess the capacity to wage war simply do not want to accept the risk of their soldiers and officers being called to account before “some” international criminal court.

Of course, as opposed to some *ad hoc* international criminal tribunals, the ICC was created in a completely valid and legal way, using for that purpose a multinational treaty (the Rome Statute), and it will persist as long as the Statute persists, or rather, as long as the commitment of the State Parties to the multinational treaty and the obligations prescribed therein persists. Even though some states have given up the Rome Statute, it is certain that it will remain in force in the near future.

The major powers have not expressed any intention of acceding to the Rome Statute, but a large number of leading states have joined it, mostly member states of the European Union, which has made accession to the Union conditional on accepting the Statute as part of the concept of rule of law.

To conclude, one should not be overly pessimistic regarding the future of the ICC, but neither is excessive optimism recommended. In terms of a conclusion about the future of the first permanent form of international criminal justice, the old truth holds that a glass halfway filled with water may be seen as either half-full or half-empty.³³

formally, but in fact, significantly closer to objective responsibility. It is difficult to see in the contemporary literature dealing with international criminal law a position according to which command responsibility is explicitly treated as a form of objective responsibility. Formally, it is not. However, some of its forms seem to be *de facto* very close to objective responsibility. Of course, this is a situation where the commander acts negligently. In other words, the concept of command responsibility in the Rome Statute has arisen from previous practice, which has indeed been predominantly reduced to the maximum objectification of the responsibility of military and other commanders, and at the same time, apparently, this solution of substantive criminal law has the role of compensating for the real evidentiary impossibilities in practice. See more: Škulić, 2002, p. 501.

33 Škulić, 2020., p. 78.

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CHAPTER 3

THE EFFECTS AND EFFECTIVENESS OF THE FUNCTIONING OF THE INTERNATIONAL CRIMINAL COURT



MAJA MUNIVRANA

Abstract

The Rome Statute of the International Criminal Court (hereinafter: the ICC) was adopted in 1998 and entered into force in 2002, marking the establishment of the ICC. Quarter of a century later and more than two decades since the ICC became operational, sufficient time has passed to undertake a comprehensive assessment of its performance - evaluating both its achievements and shortcomings, as well as the lessons learned along the way. In recent years, a range of actors—including scholars, expert bodies, non-governmental organizations, and the ICC itself—have conducted various assessments of the Court's work. After a brief introductory mapping of these different assessments, the central part of the paper deals with a methodological dilemma of choosing the right metrics. The paper identifies several evaluative approaches frequently referenced in academic literature and policy discourse, but also others that, while less commonly employed, merit inclusion in any serious discussion about the Court's effectiveness. In turn, it explores quantitative approach focused on empirical data, goal-oriented analysis with special emphasis on deterrence, assessment grounded in gender justice considerations and finally evaluations that take into account post-trial (in) justices. By examining these varied methodologies, the paper reveals the inherent complexities and limitations of measuring the ICC's effectiveness. These difficulties are then zoomed in in the last part of the paper which

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critically reflects on the challenges and promises of looking at the ICC effectiveness through different possible lenses.

Keywords: the ICC, effectiveness, metrics, goals, deterrence, gender justice, post-trial justice

1. Introduction

The Rome Statute of the International Criminal Court (ICC) was adopted in 1998, and entered into force on 1 July 2002, following its ratification by 60 states, marking the formal establishment of the ICC. Regardless of whether 2002 or 1998 is taken as its birth date, in 2023, the ICC became a fully-fledged adult. Having passed the vulnerable teething years and adolescence, reaching adulthood¹ can be seen as an appropriate time to pause for a moment and reflect on its past achievements, as well as the challenges faced and lessons learned so far.

Of course, this is not the first attempt to map the achievements and failures of the ICC. Since its inception, and in recent years in particular, systematic assessments of various aspects of the ICC's functioning have been carried out by different stakeholders, including the ICC itself. In 2010, the Study Group on Governance (hereinafter, the Study Group) was established by the Assembly of State Parties (ASP) of the ICC in the hope of facilitating 'a structured dialogue between State Parties and the Court with a view to strengthening the institutional framework of the Rome Statute system and enhancing the efficiency and effectiveness of the Court while fully preserving its judicial independence'.² In less abstract terms, the goal of the Study Group was to identify issues calling for further action and formulate recommendations for improvements to the ASP. The Study Group has continued to do so on an annual basis and its mandate has been continuously extended.³

In 2011, the International Bar Association (IBA) issued a report entitled, 'Enhancing Efficiency and Efficacy of the ICC: A Work in Progress'.⁴ This report placed emphasis on effective judicial management and timely and consistent decision making, issues particularly important from the practitioners' perspective. It noted a number of factors contributing to notoriously lengthy proceedings. At the same time, it considered the foundational phase that the ICC had recently gone through and highlighted the major role played by states in ensuring its efficiency and effectiveness.

1 Even in legal systems that require a higher threshold of 21 for reaching the age of majority.

2 ICC-ASP/9/Res.2.

3 Available at <https://asp.icc-cpi.int/bureau/WorkingGroups/SGG>

4 Available at <https://www.ibanet.org/document?id=January-2011-Enhancing-Efficiency-and-Effectiveness>

The effects of the ICC have also been analysed by the non-governmental organisations (NGOs). In 2018, Human Rights Watch, one of the most renowned organisations in the field, published a report entitled, 'Pressure Point: The ICC's Impact on National Justice: Lessons from Colombia, Georgia, Guinea, and the United Kingdom'.⁵ This report approached the ICC's effectiveness through the prism of enforcing (positive) complementarity and its success in inducing domestic prosecutions of core crimes.

One of the most comprehensive analyses to date was carried out by the ICC itself, namely, the ASP commissioned Independent Expert Review (IER).⁶ The establishment of the IER reflected the ICC's growing recognition of the need to systematically assess its own functioning. The Final Report of the IER set forth 384 recommendations aimed at assisting the ASP and the Court in enhancing the Court's impact through higher efficiency and cost-effectiveness.⁷ The highly detailed recommendations provided by the appointed external members, albeit in consultation with a number of current or former officials and members of Staff, concerned three clusters: governance, judiciary and preliminary examinations, and investigations and prosecutions. The implementation of these recommendations, which addressed both court-wide and organ-specific measures as well as external governance, is now monitored by the so-called Review Mechanism, a body comprising two State Party representatives and three ad-country Focal Points.⁸

That improving its effects and effectiveness is a key concern of the ICC is evident from the ICC strategic plans for the 2023–2025 period,⁹ launched in 2023. The overarching Strategic Plan mentions the word “effective” as many as 36 times and contains 27 measurable and specific key performance indicators linked to the 10 ICC goals, with the aim of strengthening efficiency, effectiveness, and performance management.¹⁰

In addition to these practice-oriented documents, there is a considerable body of scholarly literature, upon which this chapter builds. Researchers have explored effectiveness from different angles, including highly conceptual and methodological analyses focusing on goal-oriented effectiveness,¹¹ critical explorations of legitimate objections to the functioning of the ICC,¹² and the use of gender-based metrics.¹³

Following this brief introductory mapping of the landscape, the following section turns to methodological dilemmas involved in measuring “effects” and “effectiveness”, that is, of choosing the right metrics. It identifies different possible

5 Available at https://www.hrw.org/sites/default/files/report_pdf/ij0418_web_0.pdf

6 ICC-ASP/18/Res.7.

7 Para. 988.

8 ICC-ASP/19/Res.7. See also the Review Mechanism's Proposal for a Comprehensive action plan for the assessment of the recommendations of the Group of Independent Experts.

9 Three organ-specific and the overarching strategic plan are available at <https://www.icc-cpi.int/news/international-criminal-court-launches-strategic-plans-2023-2025>

10 Paras. 68 and 71 of the ICC Strategic Plan 2023–2025.

11 Shany, 2012.

12 Robinson, 2015.

13 Seelinger, 2022.

approaches often relied upon in the literature or policy documents. Arguably, these approaches should be seen as a part and parcel of the discussion on the ICC's effectiveness. The analysis of these different methodological approaches does not aim to be exhaustive or entirely detailed and comprehensive, but to illustrate the difficulties inherent in any discussion of the ICC's effectiveness. The final section of this chapter examines these difficulties in closer detail, critically reflecting on the challenges and promises of viewing the ICC's effectiveness through different lenses.

2. Measuring effectiveness: Choosing the right metrics

While most authors contend that measuring the ICC's effects on international peace, stability, deterrence and/or its effectiveness is important to enhance its performance,¹⁴ there is no consensus in either academic discussions or policy documents on how this should be done.¹⁵ Epistemologically, there is a divide between those who look at ICC effectiveness from a theoretical and symbolic perspective, assessing normative logical consistency or looking at its mandate, actions, and outcomes from a value-based perspective,¹⁶ and those who seek to assess the ICC's effects through an evidence-based approach and empirical assessment.¹⁷ Empiricists either base their findings on quantitative methodology, studying statistical significance and the impact of certain variables, or on qualitative methodology, focusing on case studies and comparative research.

Although researchers tend to measure the Court's effectiveness externally, as outsiders, some have sought to include internal perspectives in their analyses.¹⁸ The views of the ICC personnel, that is, practitioners working at the ICC, have long been neglected, despite the fact that their daily involvement in the work of the ICC means that they can offer valuable insights into the Court's strengths and weaknesses. However, research has revealed significant divergences in practitioners' views. In other words, ICC personnel have different ideas about what the Court's priorities should be and how these should be reflected in the ICC's daily activities. Their differing views surely affect how they evaluate the Court's effectiveness.¹⁹

14 Of course, there are also those who reject the legitimacy of the ICC from the outset or argue that the Court cannot be effective without the support of major powers. See, for example, Gordin, no date.

15 A similar conclusion has been reached by Muhammad, Hola, and Dirkzwager, 2021, p. 28.

16 For example, symbolic value has been emphasised by ICC personnel. *Ibid.*, pp. 135, 137.

17 For example, Appel, 2018.

18 Muhammad, Hola, and Dirkzwager, 2021.

19 *Ibid.*, p. 135.

2.1. Relying on the numbers: Facts and figures

Perhaps the most straightforward approach to measuring the effectiveness of the ICC is to look at quantifiable data. The statistical assessment of effectiveness may be a good starting point. Effectiveness can be defined as efficiency, that is, the degree to which maximum productivity is achieved without wasted energy or effort.²⁰ A set of indicators may be relied upon for this purpose, such as number of cases in the broadest sense (including preliminary examinations, situations under investigation, issued arrest warrants, and confirmed charges and/or convictions) against the length of trials and/or certain phases of proceedings and financial resources used.

This approach was taken by the European Parliamentary Research Service (EPRS), for example. In its 2018 'Briefing on Achievements and Challenges 20 Years after the Adoption of the Rome Statute', under the heading 'The Court's Effectiveness', the EPRS analysed the number of convictions made by the Court. At the time, only three convictions had been made, which was considered "very low" given the expenditure of almost EUR 1.5 billion between 2004 and 2018.²¹ These first three proceedings were also criticised for their length.²² The EPRS further emphasised that the ICC budget had been continuously rising, amounting to some EUR 147.4 million in 2018, a 2 per cent increase over the previous year.

This budgetary trend continued in the following years, with the budget reaching EUR 169,649,200 in 2023.²³ At the same time, however, the number of finally disposed of cases increased significantly. Since 2018, seven additional convictions and four acquittals have been issued, changing the balance slightly in favour of greater effectiveness. ICC judges have issued 40 arrest warrants and nine summons to appear, resulting in 21 suspects being detained in the ICC detention centre.²⁴ This almost exponential rise in the number of cases in the last five years compared to the first fifteen since the Court became operational indicates that it is impossible to look at the foundational years through the same assessment lenses, as will be examined further in this chapter.

The ICC itself often conflates effectiveness with expeditiousness and efficiency. The ICC Strategic Plan for the 2023–2025 period reflect an expectation – or hope – that the Court 'can contribute to the pursuit of universality by performing its work independently, impartially but also effectively and efficiently'.²⁵ Increasing the expeditiousness and efficiency of the Court's core activities (preliminary examinations,

20 See IBA Report, 2011, p. 16. relying on the Oxford Dictionary.

21 International Criminal Court. Achievements and challenges 20 years after the adoption of the Rome Statute, p. 10.

22 The Lubanga criminal proceedings lasted more than eight and a half years, the Katanga proceedings more than six and a half, and the Ngdjolo proceedings more than seven years. The first trial leading to acquittal, the Bemba case lasted over ten years. Gumpert and Nuzban, 2021, p. 561.

23 ICC Facts and Figures. Available at <https://www.icc-cpi.int/about/the-court>

24 Ibid.

25 ICC Strategic Plan, p. 12.

investigations, trials, and reparations) is the ICC's first strategic goal (i.e. Strategic Goal 1) for this timeframe.²⁶ The Court will rely on various indicators when measuring the implementation of this goal, including the time elapsed between key judicial decisions and activities vs. target advisory deadlines for key judicial activities and decisions as determined by the Chambers Practice Manual,²⁷ percentage of cancelled hearing days out of total scheduled hearing days, number of AWAs (or summons to appear) filed before the judges, and ratios of counts issued vs. counts confirmed and convicted (upon warrants, confirmation decisions, trials and appeals).

However, these indicators tell little about the quality of proceedings or their independence and fairness, which are included in Strategic Goal 1, together with expeditiousness and efficiency. Strategic goal 1 aims to:

*Increase the expeditiousness and efficiency of the Court's core activities (preliminary examinations, investigations, trials and reparations) while preserving the independence, fairness and highest legal standards and quality of its proceedings, and protecting the safety and well-being of the persons involved, in particular victims and witnesses.*²⁸

In fact, although the ICC practitioners from the Office of the Prosecutor (OTP), Chambers, and Defence did not agree on what to include as a measure of effectiveness, they reached a clear point of consensus in rejecting the number of convictions as the sole or most important metric.²⁹ Some argued that even acquittals, if fair, would indicate the ICC's effectiveness, emphasising the role of the ICC in providing fair, independent, and impartial trials where domestic courts have failed.³⁰

Needless to say, the number of prosecuted cases does not necessarily correlate to the quality and fairness of the process. The Court itself has argued that its impact does not rely on the prosecutions that it undertakes, because 'the absence of trials by the ICC, as a consequence of the effective function on national systems, would be a major success'.³¹ This statement goes hand in hand with the notion of positive complementarity, which sees the ICC as the court of last resort and emphasises its positive impact in exerting an influence on domestic jurisdictions to prosecute core crimes.

²⁶ Ibid.

²⁷ The Strategic document points to the fifth edition, which was amended twice in the meantime. The most recent version is the seventh edition, available at <https://www.icc-cpi.int/sites/default/files/2023-07/230707-chambers-manual-eng.pdf>. These indicators should address two major shortcomings contributing to the duration of trials: first, long periods of interstitial time elapse between the various steps in the proceedings, such as first appearance, confirmation of charges decision, start of trial, trial judgement, and appeal judgement; second, the small number of days on which courtroom proceedings take place. Gumpert and Nuzban, p. 560.

²⁸ ICC Strategic Plan, p. 12. This goal is further linked to linked to OTP Goals 1, 3, 6, 7, 8; Registry Goal 1; Priority Objective 1.1 and 1.6; and TFV Goal 4.

²⁹ Muhammad, Hola, and Dirkzwager, 2021, p. 146.

³⁰ Ibid, p. 148.

³¹ ICC, Paper on some policy issues before the Office of the Prosecutor, 2003, p. 4.

This leads us to the challenges involved in the numerical approach to assessing the functioning of the ICC. First, while length of the proceedings is problematic, as illustrated by the well-known maxim “justice delayed is justice denied”, and hence seen as a relevant indicator of expeditiousness and effectiveness, one must understand and allow for delays associated with building the institution and developing (consistent) jurisprudence.³² Consequently, the measured unit of time must be selected carefully and different units of time must be approached and assessed differently. Furthermore, the number of issued judicial decisions alone does not indicate whether these decisions were ever enforced. While judicial decisions that remain unenforced may carry a symbolic value, they may also lead to disappointment in and decrease the legitimacy of the Court. As Helfer and Slaughter have pointed out, while effectiveness depends on compliance with judicial decisions to some extent, compliance rates may hinge not only on the perceived quality of the Court and its decisions, but also on the nature of the remedies issued. These authors rightly warn that a “low aiming” court that issues minimalist remedies may generate high levels of compliance, but have a little impact on the state of the world.³³ Of course, compliance with judicial decisions also depends more generally on co-operation with states, which is often inadequate or completely lacking.

Given all of these challenges, doubts have been raised as to whether quantitative performance indicators can be developed and meaningfully applied to the ICC’s functioning. The 2011 IBA Report pointed out that there is no measurable performance indicator for the quality of judicial making. Indicators based on the turnover of cases, regardless of length and complexity, seem insufficient if not inappropriate.³⁴ Consequently, while assessing the functioning of the ICC based on facts and figures may serve as a starting point, it should not be the end point of such an inquiry.

2.2. Goal-oriented approach to measuring effectiveness

Social sciences research looks at effectiveness based on the so-called “rational system approach”, according to which an action is considered effective if it accomplishes its specific objective aim.³⁵ Translated to the international criminal justice arena, this means that the ICC can be seen as effective to the extent that it has achieved its goals. However, to quote Seneca, ‘[i]f a man knows not to which port he sails, no wind is favourable’.³⁶ Consequently, it is important to first identify the

32 In its 2011 Report, the IBA emphasised that despite delays, it is important that the practice of the ICC is allowed to develop organically in order to ensure that sound foundational decisions are made at this stage of the ICC’s judicial development. See IBA Report, 2011, p. 8.

33 Helfer and Slaughter, 2005, pp. 918–919; Shany, 2012, p. 227.

34 IBA Report, 2011, p. 17.

35 Shany, 2012, p. 230.

36 A quote attributed to Seneca, available at <https://www.goodreads.com/author/quotes/4918776.Seneca> (Accessed June 3, 2025)

desired goal or goals of international criminal justice and the ICC in order to assess whether these goals have been accomplished.

This is by no means an easy task. Scholars have raised concerns regarding the ambiguity or fuzziness of many of the goals of international criminal justice.³⁷ Some of these goals have been set by the mandate providers in the founding documents (i.e. official, external goals), while others have been explicitly or tacitly self-proclaimed by international courts (internal and oftentimes, but not necessarily, more specific operative goals such as those listed in the Strategic Goals).³⁸ The list is long. In addition to the standard set of goals inherent in criminal law enforcement (retribution, special, and general prevention/deterrence), international criminal courts have been tasked with a number of additional goals, which may lead to what Damaška refers to as an “overabundance” of goals.³⁹ One of the prominent goals in this goal matrix is to contribute to peace and security. In ‘Policy Paper on the Interests of Justice’, the Court emphasised that it was created ‘on the premise that justice is an essential component of a stable peace’.⁴⁰ Other goals frequently invoked in the context of international criminal adjudication include producing a reliable historical record, stopping ongoing conflicts and contributing to reconciliation in the affected regions, giving voice to victims of mass atrocities by ensuring their participation in the proceedings and addressing harm resulting from core international crimes through comprehensive compensation and reparations schemes, and propagating the values of human rights.⁴¹ While an aspiration to fulfil a number of commendable goals can be seen as a value in itself, these goals may be internally incoherent and mutually competing, hindering the effective functioning of the Court.⁴² Furthermore, many of these goals are distant and conceptually unclear, making it difficult to assess their achievability.⁴³ Scholars have also warned against “limitless optimism” with regard to institutional competence to achieve some of these goals.⁴⁴

Finally, as Shany has astutely noted, even if one remains optimistic about the possibility of identifying, ranking, and assessing the accomplishment of different types of ICC goals, one needs to be conscious of two things. First, while an organisation may fulfil its goals, doing so may incur considerable costs and negative side-effects, offsetting the desired impact. Second, failure to meet the goals may create unintended benefits, which may outweigh the negative effects of failure.⁴⁵

37 Kersten, 2015; Shany, 2012, p. 233.

38 For further detail regarding the different types of goals (official vs. operative goals, external vs. internal goals, ultimate/long-term vs. intermediate/short-term goals, and explicit, implicit, and non-stated goals), see Shany, 2012, pp. 231–233.

39 Damaška, 2007, p. 331.

40 ICC, Policy Paper on the Interests of Justice, 2007, p. 8.

41 Damaška, 2007, p. 331.

42 Ibid, pp. 331–335.

43 Kersten, 2015.

44 Weerdesteijn, M., Holá, B. 2020

45 Shany 2012, p. 237.

2.3. Deterrence as a key measure

Deterrence is one of the primary goals of the ICC, one widely accepted as the main justification for the establishment of the ICC. This is evident from the very preamble of the Rome Statute, which emphasises the resolve to ‘put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes’. Similarly, the former Secretary General highlighted the deterrent role of the ICC, arguing that ‘[t]he threat of referrals to ICC can undoubtedly serve a preventative purpose and the engagement of ICC in response to the alleged perpetration of crimes can contribute to the overall response’.⁴⁶ While deterrence is without a doubt a noble goal of the ICC, using deterrence as the main metric for measuring the effectiveness of the ICC is highly problematic for a number of reasons.

First, deterrence is an elusive goal.⁴⁷ As observed by Schabas, ‘while we can readily point to those who are not deterred, it is nearly impossible to identify those who are’.⁴⁸ Correlation between the actions of the ICC and prevention of mass atrocities is not easy to establish. How can we test the relationship between the levels and nature of violence and the ICC (or ICC intervention)? To what extent can we link state or individual conduct to specific actions or the mere existence of an international criminal court? Empirical scholarship in this area is scarce and evidence is hard to obtain or verify. Nevertheless, preliminary research indicates that states that ratified the Rome Statute tend to engage less in human rights violations.⁴⁹ Using Cingranelli and Richard’s Physical Integrity Rights Index (comprising four key indicators of human rights violations, namely, torture, summary executions, physical disappearance, and political imprisonment), Appel found that although governments with better human rights record are more likely to ratify the Rome Statute, their human rights practices continue to improve after ratification, whereas the practice of non-member states does not change significantly.⁵⁰ Prorok similarly observed that the mere ratification of the Rome Statute significantly contributes to civil war termination.⁵¹ At the same time, however, it seems that more active involvement of the ICC, in the form of preliminary examinations and investigations, can have the opposite effect of actually extending conflicts.⁵² Recent evidence supporting this conclusions is provided by the case of former Yugoslavia, where the worst crimes, including genocide in Srebrenica, occurred after the establishment of the ICTY. Similarly, in the Democratic Republic of the Congo, child recruitment continued after Lubanga was found guilty, although at lower rates.⁵³ This is perhaps not surprising

46 Ki-Moon, 2012, p. 9.

47 Schense and Carter, 2017, p. 4. These authors discuss different meanings of the notion of deterrence.

48 Kersten, 2012, quoting Schabas.

49 Appel, 2018, p. 5.

50 Ibid., pp. 4–5.

51 Prorok, 2017, p. 231.

52 Ibid, p. 228.

53 Schense and Carter, 2017, p. 430.

given that ICC involvement is often undesirable for at least one side to the conflict, and the prospects of possible international prosecution may inform leaders' strategic decisions and actually prolong civil wars. This concern has often been emphasised in the long-standing peace v. justice debate.⁵⁴

However, drawing statistical conclusions about the effects of ICC interventions runs the risk of 'decontextualizing political violence, [and] attributing responsibility for increases and decreases in violence to the ICC without adequately considering other factors which also contribute to alterations in levels of violence'.⁵⁵ It is also premised on the idea of being able to rationally calculate costs and benefits. Even if the perpetrators of ordinary crimes are rational actors who weigh the potential costs entailed in possible prosecution and the benefits of commissioning a crime, it is questionable if the same premise applies to the extraordinary circumstances of mass atrocities and armed conflicts.⁵⁶

It is further paradoxical to emphasise the role of deterrence in circumstances of high selectivity in which the ICC operates. The ICC's jurisdictional reach is legally limited, and even where it exists, the enforcement net is still not sufficiently strong and wide. Compounding matters, the ICC's reliance on co-operation, particularly that of third states, often undermines compliance. Moreover, due to legal, structural, and political reasons, entire categories of perpetrators are either *de iure* or *de facto* exempt from accountability. Even in the eighteenth century, Cesare Beccaria argued that it is the certainty of punishment (and probability of being apprehended) rather than its mere existence or severity that acts as a deterrent.⁵⁷

These objections have led some authors to discard deterrence as the leading goal and focus instead on building a culture of accountability through pedagogic influence, norm-internalisation,⁵⁸ and stigmatisation of extreme forms of inhumanity, thereby bolstering national jurisdictions and encouraging domestic prosecutions⁵⁹ in line with the principle of positive complementarity. Although these goals are not precisely measurable, they should contribute to the prevention of mass atrocities in the long run.

2.4. Gendered assessment of the effective functioning of the ICC

One metric gaining ground as the yardstick for measuring the performance of the ICC is that of its record regarding sexual and gender-based crimes (SGBCs).⁶⁰ In this sphere, positive results, at least in comparison to how gender-based crimes

54 See, for example, Kersten, 2015b.

55 Ibid.

56 Drumbl, 2007, p. 17.

57 Beccaria, 1775.

58 In line with Harold Koh's seminal piece, Koh, 1999. See also Damaška, 2007, p. 345. In order to exercise this socio-pedagogic role, the ICC must be perceived as a fair and legitimate authority.

59 Human Rights Watch. (2018).

60 See, for example, Seelinger, 2022. See also Chappel, 2015, cited by Drumbl, 2016.

have been treated in the past, are immediately palpable. While it is true that some important progressive developments have been made through their case law,⁶¹ the Statutes of the *ad hoc* tribunals included rape explicitly only as a form of crimes against humanity, not war crimes, without mentioning any other form of sexual or gender-based crimes. In stark contrast, the Rome Statute of the ICC mentions the term “gender” nine times and for the first time in international criminal law explicitly incriminated various forms of SGBCs as underlying acts of both crimes against humanity and war crimes, regardless of the nature of an armed conflict. In addition to rape, the Rome Statute expressly mentioned sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, and other forms of sexual violence (of comparable gravity),⁶² thereby acknowledging that conflict-related sexual violence manifests in multiple ways, not “just” rape.

Another novelty is the recognition of gender persecution as a crime against humanity.⁶³ The Statute was the first to define gender as referring to ‘the two sexes, male and female, within the context of society’.⁶⁴ The Statute also clarifies that the term does not indicate any different meaning from the one explicitly specified. Although this definition, the product of negotiations and political compromise, is surely not as comprehensive as a modern understanding of gender would require,⁶⁵ it constitutes an important first step towards fully recognising sexual and gender-based violence, opening the way to further developments.

These developments have been made through both ICC case law and its policy documents, notably the Office of the Prosecutor’s (OTP) 2014 Policy Paper on Sexual and Gender Based Crimes (hereinafter, the Policy Paper).⁶⁶ Starting from the World Health Organization’s distinction of sex and gender,⁶⁷ the OTP “explained” that the

61 See, for example, the case of Furundžija, interpreting rape broadly and recognising that rape and other forms of sexual violence in armed conflict constitute war crime of torture within the definitions of war crimes (art. 2. of the ICTY Statute). See Case information sheet, available at https://www.icty.org/x/cases/furundzija/cis/en/cis_furundzija.pdf. Another landmark decision in this regard is Akayesu, in which the ICTR Chamber held that rape and other sexual offences could also constitute genocide and in particular conduct of ‘imposing measures intended to prevent births within the group’ by sexual mutilation, the practice of sterilisation, forced birth control, separation of sexes, and prohibition of marriages. The Chamber further emphasised that rape can be a (mental) measure intended to prevent births ‘when the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate’. See The Prosecutor v. Jean-Paul Akayesu, ICTR-96-4-T, paras. 507–508.

62 See art. 7(1)(g) and art. 8(2)(b) (xxii) and (e)(vi) of the Rome Statute.

63 Art. 7(1)(h).

64 Art. 7(3).

65 For further discussion of negotiations that resulted in constructive ambiguity, that is, vague language that can simultaneously mean different things to different people, see Oostervald, 2016. She argues that the initial uncertainty about the exact meaning and scope of the term caused reluctance to rely on the term at first.

66 ICC, Policy Paper on Sexual and Gender Based Crimes, 2014. Earlier this year, in May 2023, the OTP launched public consultations to renew the policy, see <https://www.icc-cpi.int/news/office-prosecutor-launches-public-consultation-renew-policy-paper-sexual-and-gender-based>

67 According to which sex refers to the biological and physiological characteristics that define men and

definition of gender in Art. 7(3) of the Rome Statute ‘acknowledges the social construction of gender, and the accompanying roles, behaviours, activities, and attributes assigned to women and men, and to girls and boys’. Once it broadened the understanding of the notion of gender, the next logical step was to define “gender-based crimes” as crimes committed against persons, whether male or female, because of their sex and/or socially constructed gender roles. The Policy Paper also clarified that gender-based crimes are not always manifested as a form of sexual violence and that they may include non-sexual attacks on women and girls, as well as men and boys, because of their gender. Finally, the Policy Paper highlighted the need for a gender perspective and gender analysis, both requiring understanding of differences in status, power, roles, and needs between males and females, as well as the impact of gender on people’s opportunities and interactions and their experience of harm.

It is neither necessary nor possible to cover the whole Policy Paper here. In a nutshell, the Policy Paper recognised that SGBCs are amongst the gravest crimes under the Statute and pledged to ensure that henceforth, charges would be brought whenever supported by sufficient evidence.⁶⁸ The OTP also promised to bring cumulative charges if possible; to reflect the gravity, range, and multifaceted character of these crimes; and to propose sentences adequately reflecting the impact of these crimes. The Policy Paper also gender-mainstreamed reparations policies to encompass gender specific impact on victims of this type of harm.

At roughly the same time as it published the Policy Paper on SGBCs, the OTP elevated the prosecution of sexual and gender-based crimes to one of its key strategic goals (Strategic Plan 2012–2015) and the Office has remained committed to this goal. Indeed, subsequent OTP Strategic Plans have included the prosecution of SGBC as one of the OTP’s top priorities,⁶⁹ and the most recent overarching ICC Strategic Plan (2023–2025) integrated gender perspective in various aspects of its work, not just prosecution of mass atrocities.⁷⁰

Another step forward in the field of gender justice can be seen in the 2022 Policy on the Crime of Gender Persecution.⁷¹ Throughout history, gender persecution was normalised through institutionalised gender discrimination and violence, resulting in not being perceived as a wrongdoing, let alone a crime. This has yet to change sufficiently, even with the elevation of gender persecution to the level of an (international) crime.⁷² Indeed, almost 20 years after its adoption in the Rome Statute, it has

women.

68 In response to criticisms surrounding the Lubanga judgement, in which the prosecutor charged (only) the recruitment of child soldiers and not any form of SGBC, despite the presence of preliminary evidence pointing in that regard.

69 The OTP’s Strategic Goal no. 6. for 2023–2025 is to ‘[e]nsure effective investigations and prosecutions of Sexual and Gender-Based Crimes and Crimes Against Children’.

70 Gender mainstreaming in all activities of the court is Strategic Goal no. 3.

71 ICC, Policy on the Crime of Gender Persecution, 2022. Policy was drafted by the Special Adviser on Gender Persecution and published in December 2022.

72 For an overview of the most recent instances of gender persecution, see Davis, L., 2023.

hardly been investigated or adequately charged, underscoring the significance of the Policy on the Crime of Gender Persecution to further clarify the meaning and importance of this crime. This policy recognises that ‘gender-based crimes are used by perpetrators to regulate or punish those who are perceived to transgress gender criteria that define “accepted” forms of gender expression manifest in, for example, roles, behaviors, activities and attributes’. Consequently, persecution is often the result of trying to force people into gender “boxes” of maleness and femaleness as perceived by the perpetrator.⁷³ The Policy on the Crime of Gender Persecution further explains that the recognition of gender persecution is important not only because it helps to unearth the discriminatory intent that can drive mass atrocities or entire conflicts, but also because it can shed light on the particular vulnerability of victims due to multiple and intersecting forms of discrimination.⁷⁴ Moreover, (gender) persecution charges can link different violations into patterns of crimes, thereby connecting individual acts into a connected series of events, which can help attribute criminal responsibility to those who have not been physically involved, such as commanders.⁷⁵

Exciting breakthroughs have been made through the case law as well. Although overturned on appeal, the Bemba trial judgement is groundbreaking for its condemnation of sexual violence committed against men and boys, not just women and girls.⁷⁶ However, the first final conviction for SGBC occurred more than two decades after the adoption of the Rome Statute. The striking accountability gap in the ICC’s SGBC-related jurisprudence was closed in 2019, with the final conviction in the Ntaganda case. What distinguishes this case is not just that it represents the first ICC conviction for rape and sexual slavery against male and female civilians, but that Bosco Ntaganda was convicted for sex-related inter-party crimes as war crimes, namely, rape and sexual slavery allegedly committed against child soldiers recruited into the *Union des Patriotes Congolais/Forces Patriotiques pour la Libération du Congo* (UPC/FPLC) by fellow soldiers of the same armed group. The Court thus rejected the argument that sexual violence in intra-party relations, that is, within the same group, did not amount to a war crime under the Statute, as such conduct does not constitute a violation of the underlying rules of international humanitarian law.⁷⁷ The third landmark case in this respect is the 2020 conviction of Dominic Ongwen, who was convicted of multiple SGBCs committed while he was a commander in the Lord’s Resistance Army in Uganda from 2002 to 2005. This case is remarkable for many reasons, including being the first to charge for forced pregnancy as a stand-alone crime against humanity under Art. 7(1)(g), along with forced marriage as an

73 Oosterveld, 2013.

74 It gives example of LGBTQI+ persons who can belong to women, girls, men, and boys groups, and who can also be targeted for belonging to LGBTQI+ groups.

75 Jarvis, 2023.

76 Seelinger, 2022.

77 The issue of whether or not the Rome Statute imports from IHL a status requirement and makes it a constituent element of the sex-related offences listed under Articles 8(2)(b)(xxii) and 8(2)(e)(vi) has been heavily contested in the literature. Comp. Heller, 2017 and Poltronieri Rossetti, 2019.

“other inhumane act” as a crime against humanity under Art. 7(1)(k), indicating that these offences do not solely constitute a sexual violation.⁷⁸ This approach has been celebrated in the feminist literature for recognising the multitude of harms involved in forced marriages – harms that transgress sexual slavery alone.⁷⁹

In addition to these pioneering convictions, the OTP successfully charged the crime of gender persecution in the *Prosecutor v. Al Hassan* case.⁸⁰ For ten months in the Malian city of Timbuktu, women and girls were forced to cover their faces, prohibited from going out at night or being alone with or speaking to men other than their husbands and close relatives, and girls were banned from schools.⁸¹ Gender capturing of this type of conduct in the *Al Hassan* case has opened the door for similar charges in two other cases: charges of persecution on the grounds of gender (along with ethnic, political, and/or religious grounds) have since been brought in the Central African Republic and Darfur situations.⁸²

Finally, while not directly relevant to the issues related to accountability for SGBCs, partially in response to the IER Final Report, the ICC recently and openly affirmed its commitment to integrating a gender perspective and analysis into all of its work. In this vein, in December 2022, the first comprehensive Court-wide Gender Equality and Workplace Culture Strategy (GEWC Strategy) was launched with the aim of promoting gender parity and equal opportunities, safe and inclusive workplace culture, and life–work balance.⁸³ Given all of the above, while recognising that it remains a work in progress, even before the latest developments, in 2016, Drumbl already characterised gender justice as ‘infusing the aesthetics of international criminal law’.⁸⁴

2.5. Assessing effectiveness through the post-trial glasses

Unlike the Court’s record in dealing with SGBC, which has permeated the literature on the ICC’s effectiveness, a metric that has rarely, if ever, been used in this context is that of post-trial justice. What happens to defendants after conviction, or release, has generally been overlooked. Therefore, it is not surprising that the fate of ICC convicted or even released persons, either after serving their sentences

78 See counts 50 and 58 of the Trial Judgment, *Prosecutor v. Ongwen*, ICC-02/04-01/15.

79 It encompasses forced cooking, cleaning, childbearing, and child-rearing, and all inherently gendered forms of forced labour. See Oosterveld, 2016.

80 Earlier attempts failed. The Prosecutor attempted to bring charges of gender persecution in the *Mbarushimana* case, but these were ultimately excluded from the document containing the charges. *Prosecutor v. Mbarushimana*, Pre-Trial Chamber I, ICC-01/04-01/10. In the *Al Hassan* case, charges of persecution on grounds of gender were confirmed by the ICC Pre-Trial Chamber on 30 September 2019. *Prosecutor v. Al Hassan*, Pre-Trial Chamber I, ICC-01/12-01/18-461-Corr-Red.

81 Oosterveld, 2023.

82 See *Prosecutor v. Al Rahman*, Confirmation Decision, ICC-02/05- 01/20 and *Prosecutor v. Said*, Confirmation Decision, ICC-01/14- 01/21.

83 ICC, Gender Equality and Workplace Culture Strategy, 2022.

84 Drumbl, 2016.

or following acquittals, has not been regarded as a measure by which to judge the performance of the ICC. This is a clear consequence of a strong anti-impunity discourse, which has shaped the narratives of international criminal justice. Primary focus on prosecution and punishment with conviction as the end goal has obscured everything that happens after trial, which is probably why legal schemes were not envisaged at all, or why the existing ones remained underdeveloped and unable to adequately address different (human rights) issues arising out of convictions, acquittals, and releases.⁸⁵ These issues are an integral part of executing international justice and cannot be ignored when assessing the successes and failures of international criminal tribunals, including the ICC.

A striking feature of the post-trial phase of international criminal justice is that the issues arising from conviction, or release, are often reverted back to states, which are generally reluctant or even unwilling to address these issues in a meaningful way.⁸⁶ In general, the system of international criminal justice rests on the co-operation of states. Even when co-operation is present during trial, it often ceases once the trial ends. From that point on, the general sense of responsibility seems to disappear and no one is or feels legally or *de facto* responsible, as was recently demonstrated by the so-called Niger crises.⁸⁷

The number of enforcement of sentence agreements with states is relatively low,⁸⁸ and there is only one such agreement on the release of ICC detained persons, signed by Argentina.⁸⁹ However, to date, all 51 defendants at the ICC have come from other continents, primarily Africa.⁹⁰ Given this fact and in view of Argentina's geographical distance and cultural, religious, and linguistic differences, as well as problems connected with family reunification, Argentina can hardly be seen as an ideal destination for the relocation of released persons. Moreover, these post-trial co-operation agreements are structured as double consent agreements, which means that a State that has declared general willingness to enforce the ICC's sentences – or accept released persons – must reiterate their consent with respect to specific individuals.⁹¹ Accordingly, in practice, it may prove difficult to find a plausible solution

85 Holá, Mulgrew, and Munivrana, 2023, pp. 55–59.

86 Ibid, p. 58.

87 On 5 December 2021, eight acquitted and released individuals from the International Criminal Tribunal for Rwanda (ICTR) were transferred to the Republic of Niger by the United Nations (UN) International Residual Mechanism for Criminal Tribunals (IRMCT). They had been unable and unwilling to return to Rwanda for fear of persecution, and had failed to obtain relocation elsewhere as other states refused to resettle them or grant them access to their territory. Despite the relocation agreement between Niger and the UN, on 27 December 2021, the men were served with a “definitive expulsion order” issued by the Nigerian authorities, and the eight men have since been held under house arrest in Niamey for more than a year. See Lecolle, 2023, p. 168.

88 See <https://www.icc-cpi.int/news/icc-and-spain-conclude-agreement-enforcement-sentences>

89 See International Criminal Court, ‘Argentina and ICC sign agreements on Interim Release and Release of Persons, reinforcing Argentina’s commitment to accountability and fair trial’.

90 For a list of defendants, see <https://www.icc-cpi.int/defendants>

91 ICC, Cooperation agreements, p. 19.

for the relocation of former ICC defendants, even when co-operation agreements exist, especially when dealing with defendants coming from countries with unstable political situations. Consequently, the Court has and will have to continue to negotiate *ad hoc* agreements to avoid situations of a legal limbo.⁹²

Another gap in the legal post-trial framework can be found in the treatment of convicted persons serving their prison sentences, particularly that of the terminally ill. The Rome Statute permits a sentence reduction review only *after* two thirds of a determinate sentence or 25 years of a life sentence has been served.⁹³ It does not recognise either conditional or compassionate release. If a sentence reduction is granted, this reduction constitutes an unconditional and permanent form of release. There is no system for granting early release subject to conditions, a scheme recognised by the *ad hoc* tribunals, or for revoking release in any situation, including one in which there has been an (unexpected) improvement in the convict's health, which could be relevant when sentence reduction was specifically granted due to a worsening state of physical or mental health (Rule 223[e]).⁹⁴

Naturally, these post-trial issues did not come to the fore during the first years of the ICC. Nonetheless, they will surely become more prominent as the number of ICC defendants serving their prison sentences and/or being released rises. Possible human rights violations resulting from, or at least in connection to or as a consequence of, ICC proceedings cannot be ignored and should affect the way in which the ICC's performance is measured and assessed.

3. Concluding remarks

Several conclusions can be drawn from the foregoing analysis. First, there is no consensus on what constitutes effectiveness. Measuring the effects and effectiveness of the ICC can and should be approached from different angles, as looking at it from only one perspective – such as solely from the perspective of facts and figures or that of overarching goals – will create a distorted or at least a limited picture. For example, a court can be very effective in terms of the number of convicted persons, but this may be based on unfair proceedings jeopardising the right to a fair trial. Different metrics reflect an array of sometimes contradictory assignments that the ICC is expected to fulfil.⁹⁵ The Court is advancing valuable aims that are diverse in nature, many of which transcend the trial itself.⁹⁶ Even when these aims or ex-

92 Lecolle, 2023, p. 177.

93 Rule 223(e) of the ICC Rules of Procedure and evidence and Art. 110(3) of the Rome Statute.

94 Mulgrew, 2023, p. 77.

95 On overabundance of goals, see Damaška above.

96 This is particularly the case with deterrence and other goal-oriented metrics.

pectations are not mutually exclusive, not all of them can be achieved at once and achieving balance between them is necessary.

Second, when evaluating the work of the ICC, to a large extent, we are not dealing with measurable and empirically verifiable data.⁹⁷ Many of the metrics used are symbolic, value-based, or normative, particularly those assessing the gender dimension, post-trial justice, and so on. Even when conclusions about the effects of the ICC are supported by empirical evidence, one cannot ignore the complex environment within which the ICC is acting, with multiple factors simultaneously affecting the behaviour of states and individuals.

Finally, underdeveloped ideas about what constitutes effectiveness and how to measure it may lead to unsatisfactory results and disappointment with the ICC.⁹⁸ Clearly, valid objections to and a sober reflection on failures and achievements are welcome, but, as Robinson illustrated with a number of examples, almost every decision of the Court may be legitimately criticised. One must be aware of the elusiveness of “just right” solutions and of the “inescapable dyads” the ICC is facing as a part of a system that seeks to create “a vertical regime on a horizontal plane”.⁹⁹ Expectations need to be managed. At the same time, outreach activities should be intensified. It is not sufficient to focus on how the international community perceives effectiveness. At least equally important is how the work of the Court is assessed by local constituencies. The importance of considering local responses is closely connected with the Court’s pedagogic role.¹⁰⁰ Research shows that views on the work of an international criminal court held by the local target population will inevitably differ – after all, the local population does not speak in a single voice – and inducing a change in attitudes, particularly among those who reject the Court’s legitimacy, has proven immensely difficult for the *ad hoc* tribunals.¹⁰¹ In addition to placing more emphasis on its outreach activities, the ICC will have to fight negative propaganda, omnipresent in the era of fake news and internet (ir)responsibility. Greater efforts should also be made to overcome legitimate objections regarding selectivity – not just in terms of limited jurisdictional reach of the Court, but also with respect to case selection and prioritisation.¹⁰² Taken together, these steps can have meaningful, if not transformative, effects and contribute to building a culture of global accountability.

97 Shany, Y. 2012, p. 270.

98 Ibid. p. 229.

99 Robinson, D. 2015, p. 332.

100 Damaška, M. 2007, p. 348.

101 Milanović, M. 2016, pp. 233–259.

102 International Criminal Court, Office of the Prosecutor. (2016) p. 16, argues that “feasibility” should not be a separate legal factor for determining the opening of investigations as it could prejudice the consistent application of the Statute and might encourage obstructionism to dissuade ICC intervention. However, operational feasibility is a criterium for case selection.

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CHAPTER 4

THE INTERPLAY BETWEEN THE ICC AND OTHER INTERNATIONAL COURTS AND TRIBUNALS: FROM THE NUREMBERG PRINCIPLES TO THE LATEST ICJ CASE LAW



KATARÍNA ŠMIGOVÁ

Abstract

This chapter explores the interplay between the International Criminal Court (ICC) and other international judicial bodies, notably the International Court of Justice (ICJ), through the lens of the foundational Nuremberg Principles. Originating from the Nuremberg trial after World War II, these principles presented revolutionary concepts under international law such as individual criminal responsibility, irrelevance of official capacity, and the precedence of international over national law. The analysis examines how these principles were adopted, adapted, or reinterpreted across the statutes and jurisprudence of subsequent international tribunals, including the ad hoc tribunals for Yugoslavia (ICTY) and Rwanda (ICTR), and also the Rome Statute, which established the ICC in 1998.

The chapter marks out two key aspects of interplay: a developmental aspect, tracing the historical and legal evolution of the Nuremberg principles into contemporary instruments of international criminal justice; and an actual aspect, analysing the formal and practical application (or omission) of these principles in case law, particularly within ICC proceedings and ICJ advisory opinions. While the ICC does not formally treat the Nuremberg principles as binding legal sources under Article 21 of the Rome Statute, their normative influence remains evident.

Special attention is paid to legal concepts such as immunities, complementarity, control over crimes, and fair trial rights, showing how these have been shaped by

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precedents across tribunals. The chapter also explores how the ICJ, despite focusing on state responsibility, has indirectly influenced ICC interpretations of international law through decisions like the Arrest Warrant and Genocide cases.

At last, the chapter argues that the Nuremberg legacy continues to underpin the global criminal justice architecture, shaping the aim of upholding accountability, justice, and the rule of law. The dynamic relationship between courts underscores the interconnectedness of international efforts to prevent impunity and ensure human rights protections.

Keywords: Nuremberg principles, International Criminal Court, international judicial bodies, interplay, sources of international (criminal) law

1. Introduction

Developed after the Second World War, the Nuremberg Principles laid the foundation for the prosecution of individuals for international crimes, influencing subsequent international legal frameworks. The Rome Statute, which established the International Criminal Court (ICC) in 1998, marked a milestone in the creation of a permanent ICC with jurisdiction over genocide, war crimes, crimes against humanity, and the crime of aggression. The International Court of Justice (ICJ), a principal judicial organ of the United Nations, plays a crucial role in the interplay between States by resolving disputes and providing advisory opinions on legal issues. Although the ICC and ICJ differ in their jurisdiction, ruling on the responsibility of an individual or a State, respectively, they do not exist in vacuum.

Over time, the ICJ has dealt with cases that intersect with the jurisdiction of the ICC, shaping the landscape of international criminal and humanitarian law. Notable ICJ cases, such as the Arrest Warrant of 11 April 2000, have influenced the interpretation of immunity and jurisdictional issues that impact the ICC's proceedings. Developments in ICJ case law have influenced the interpretation of international law norms, contributing to the broader framework within which the ICC operates. Landmark cases, such as that of the Bosnian genocide, have addressed issues relevant to both the ICJ and the ICC, defining the contours of accountability for international crimes. Therefore, examining the interplay between these courts can yield valuable insights.¹

This chapter examines the developmental and actual interplay between the ICC and other international courts and tribunals, focusing on the Nuremberg Principles in their establishing documents and case law. The first section deals with the individual Nuremberg Principles and their presence in the establishing documents of international courts outside the Nuremberg Tribunal. The second section analyses

1 Only cases whose merits have already been decided are included into this chapter.

the position of the Nuremberg Principles as formal sources of international law for other international criminal judicial bodies.

Although varying in the motivation for and manner of their establishment, international judicial bodies share the same aim. Indeed, whether focusing on the peaceful settlement of interstate disputes or prosecution of perpetrators of the most serious crimes under international law, their *raison d'être* is justice and, when functioning, respect for the rule of law. The interplay between the ICC and other international courts and tribunals thus reflects the dynamic nature of international law, highlighting the interconnectedness of efforts to promote accountability and the protection of human rights on the global stage.

2. Developmental Interplay

There have been several milestones in the development of international law, including the Second World War. In the twentieth century, the scourge of global war brought untold sorrow to mankind,² resulting in the recognition that, despite previous traditions, serious crimes concerning the international community as a whole could no longer be allowed to go unpunished.³ This specific material source of law and reconsideration of the principles of humanity changed the understanding of the absolute position of states and their officials. This transformation was accompanied by the preparation and adoption of the London Agreement. Annexed to this agreement, the Nuremberg Charter established the International Military Tribunal (hereinafter, Nuremberg Tribunal) to prosecute top German officials for crimes against peace, war crimes, and crimes against humanity.⁴

When the Nuremberg Tribunal completed its mandate, the International Law Commission (ILC), a body of distinguished legal experts, was asked under General Assembly resolution 177 (II) to formulate the principles of international law recognised in the Charter and the Judgment of the Nuremberg Tribunal. As the Nuremberg Principles had already been affirmed by the General Assembly and previously by the Nuremberg Tribunal itself, the ILC merely had to formulate them. Although sometimes labelled “victor’s justice”,⁵ the Nuremberg Principles laid the foundation of a new area of public international law, which had hitherto focused solely on the position of the State.⁶ This new sphere, namely, international criminal law, broke

2 See the Preamble of the UN Charter.

3 Compare the preamble of the London Charter and Rome Statute.

4 Charter of the International Military Tribunal. (1945, August 8).

5 Cryer et al., 2010, p. 113.

6 Principles of International Law recognized in the Charter of the Nürnberg Tribunal and the Judgment of the Tribunal, International Law Commission, *Yearbook of the International Law Commission*, 1950, vol. II (ILC Nuremberg Principles).

through the inviolability of some features of the concept of State sovereignty and strengthened the rule of law.⁷

2.1. Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment

Individual criminal responsibility, the first Nuremberg Principle, can be considered the basis of the paradigm shift in international law. Indeed, one of the most well-known quotes from the Nuremberg trials is: ‘Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provision of international law be enforced’.⁸

Despite constituting a breakthrough, this principle is not enough to hold top officials accountable, as they are rarely present at the site of the crime.⁹ Moreover, compared to national systems, criminality at the international level has several specific features, one of which is its systematic character.¹⁰ In light of the sophisticated system in which the Nazis functioned, in addition to systematic criminality, the concepts of conspiracy and criminal organisation have become a pillar of the Nuremberg system.¹¹

Although individual criminal responsibility under international law was similarly established by the Genocide Convention,¹² the Geneva Conventions of 1949¹³ and their Additional Protocol I of 1977,¹⁴ and the Convention Against Torture,¹⁵ it was only in the 1990s that it was dealt with in greater detail with the issue of the Draft Code of Crimes Against the Peace and Security of Mankind in 1996¹⁶ and the Statutes of the *ad hoc* International Crime Tribunals created for Former Yugoslavia and Rwanda (ICTY and ICTR, respectively). The latter established individual

7 King, 2007, p. 653 et seq.

8 International Military Tribunal (Nuremberg). (1946, October 1), para. 447.

9 Although they were highly involved in the crime, as indicated in the London Agreement, Art. 1, their offences had no particular geographical location.

10 See also Cassese, 2008, p. 7.

11 Van Sliedregt, 2012, p. 23.

12 The Convention on the Prevention and Punishment of the Crime of Genocide was adopted by the United Nations General Assembly on 9 December 1948 as General Assembly Resolution 260.

13 Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Convention (II) for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea; Convention (III) relative to the Treatment of Prisoners of War; Convention (IV) relative to the Protection of Civilian Persons in Time of War. Adopted in Geneva, 12 August 1949.

14 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

15 The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984.

16 Draft Code of Crimes Against the Peace and Security of Mankind, ILC, Yearbook of the International Law Commission, 1996, vol. II, Part Two.

criminal responsibility in relation to the different ways of participating in a crime.¹⁷ As the Statutes of the *ad hoc* Tribunals did not differentiate between the various ways of committing and participating in a crime, the tribunals had considerable leeway in interpreting individual criminal responsibility. This led to the tribunals distinguishing between principal and accomplice offenders, which affected their decisions regarding punishment.¹⁸

The first decisions of the *ad hoc* Tribunals were adopted at roughly the same time that the Rome Statute was being prepared, influencing its provisions. Individual criminal responsibility is set out in Art. 25 of the Rome Statute. The first paragraph establishes the general principles, namely, that the Court has jurisdiction only over natural persons who, when committing an offence under the jurisdiction of the Court, are individually responsible and subject to punishment in accordance with the Statute. The fourth paragraph clearly states that no provision of the Statute on individual criminal responsibility affects the responsibility of States under international law. Moreover, the Review Conference of the Rome Statute in Kampala saw the adoption of a specific provision in relation to the “crime of aggression”, which, for the purpose of the Statute, is defined as an act of aggression committed by a person in a position to control or direct the political or military action of a State.¹⁹

Extensive para. 3 of Art. 25 of the Rome Statute systematises the different modes of individual liability for participating in a criminal act at the international level. Unlike the Nuremberg system with its unitary model, the Rome Statute differentiates between various forms of participation in a criminal act. However, the hierarchy in Art. 25 of the Rome Statute is not one of guilt.²⁰ Nevertheless, like its predecessors, the ICC emphasised the need to end impunity for the perpetrators of the most serious crimes under international law. In practice, this refers to the efforts to prove culpability, especially of individuals who were not present at the site of a crime but nevertheless had control over the commission of that crime. Although the Rome Statute does not explicitly address the issue of control, ICC judges have adopted it in most cases since the Lubanga case.²¹ Based on this concept, it is possible to distinguish the main perpetrator from an accomplice.²² The concept of control has also influenced the rejection of joint criminal enterprise responsibility within ICC case law since it was determined that the objective element of a crime was decisive in establishing individual criminal responsibility.²³

17 Art. 7 of the ICTY Statute, Art. 6 of the ICTR Statute.

18 Werle, Jessberger, 2014, p. 195.

19 Art. 8b para. 1 of the Rome Statute.

20 ICC, Ngudjolo Chui Judgment, 18 December 2012, concurring opinion of Judge Van den Wyngaert, paras. 22 et seq.

21 ICC, The Prosecutor v. Thomas Lubanga Dyilo, Judgment, 1 December 2014, ICC-01/04-01/06 A 5, paras. 326–41; ICC, The Prosecutor v. Germain Katanga et al., Decision on the Confirmation of the Charges, 30 September 2008, ICC-01/04-01/07, paras. 480–6.

22 ICC, The Prosecutor v. Thomas Lubanga Dyilo, Judgment, 1 December 2014, ICC-01/04-01/06 A 5, para. 469.

23 See also *infra* Section 2.7 on complicity as a crime under international law in this chapter.

In fact, the issue of control reflects the interplay among international judicial bodies. Control needs to be effective in cases concerning States (e.g. ICJ Nicaragua case) or overall (e.g. ICTY Tadić case). It is differentiated in cases involving the interpretation of Art. 25 of the Rome Statute, with levels of control of the objective element of the offence under international law divided into essential, substantial, and significant contribution to the commission of the offence based on the level of participation. Without going into further detail, these concepts are related to and influenced by the legal basis of establishing documents of relevant judicial bodies and their jurisdiction.²⁴

Other than States, the ICJ Advisory Opinion on Reparation for Injuries Suffered in the Service of the United Nations is typically referred to regarding the position of subjects of international law. As the ICJ pointed out, the subjects of law in any legal system are not necessarily identical in their nature or the extent of their rights, and their nature depends upon the needs of the community.²⁵ Throughout its history, the development of international law has been influenced by the requirements of international life.²⁶ The atrocities of the Second World War led to States adopting the UN Charter and London Charter. In a judgement delivered in October 1946, the Nuremberg Tribunal directly established the international position of individuals in criminal cases under international law. One can only wonder about how this decision influenced the well-explained advisory opinion of the ICJ delivered in April 1949.

2.2. The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law

The principle of the supremacy of international law is the only Nuremberg Principle that was not expressly integrated into the Statutes of the *ad hoc* Tribunals or the Rome Statute. Nonetheless, it is clearly essential for international criminal judiciary as it suggests that an individual remains responsible for committing a criminal act under international law regardless of whether that act is punishable under national law. This principle is thus a confirmation of the precedence of international law over national law.²⁷

Although the UN Charter affirms the principle of non-intervention in the domestic matters of States, the UN Security Council can adopt binding measures under Chapter VII that allow it to establish international judicial bodies in the event of a threat to peace.²⁸ Regarding the Statutes of the *ad hoc* Tribunals, the principle of precedence of international law has been realised by the system of concurrent

²⁴ See, for example, Ohlin, 2014.

²⁵ ICJ, Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 11 April 1949, ICJ Reports 1949, p. 178.

²⁶ Ibid.

²⁷ ILC Nuremberg Principles, para. 102.

²⁸ Krisch, 2012, p. 1319 et seq.

jurisdiction.²⁹ This system prioritises criminal prosecution at the international level as the situation in the conflict country is one in which the State is unable or unwilling to deal with the challenge of prosecuting offenders of the most serious crimes under international law.

Although the ICC operates under the principle of complementarity, the second Nuremberg Principle is a part of its framework as it was established by an international treaty. The Rome Statute is covered by the Vienna Convention on the Law of Treaties, according to which a party may not invoke the provisions of its internal law as justification for its failure to fulfil a treaty.³⁰ The same applies to the ICJ, which was established by an international treaty. Furthermore, Parties to the ICJ Statute accept that its decisions are legally binding for the parties to the dispute.³¹

In short, although the second Nuremberg Principle, which was highly innovative in the wake of the Second World War, is not expressly included in the Statutes of the *ad hoc* Tribunals or the Rome Statute, its spirit is *de facto* present in the operative logic of international judicial bodies.

2.3. The fact that a person who committed an act which constitutes a crime under international law, acted as Head of State or responsible Government official does not relieve him from responsibility under international law.

Irrelevance of official capacity, the third Nuremberg Principle formulated by the Commission, was based on Art. 7 of the Nuremberg Charter. The Nuremberg Tribunal clearly stated that the principle of international law, which protects a State's representatives under certain circumstances, cannot be applied to conduct internationally recognised as criminal.³² This approach was intended to prevent the authors of these acts from hiding behind their official position to escape punishment.³³

This approach was also upheld in the *ad hoc* Tribunals Statutes (Art. 7 para. 2 of the ICTY Statute and Art. 6 para. 2 of the ICTR Statute) and the Rome Statute in Art. 27 para. 1. However, while the principle of the irrelevance of official capacity is still acceptable in general, one has to keep two things in mind. First, the Rome Statute is an international treaty and cannot create legal duties upon third states. Second, the fact that an official is criminally responsible does not automatically mean that they are prosecutable as there might be a procedural bar to prosecution by the ICC, which is partially dealt with in Art. 27 para. 2 of the Rome Statute, i. e. by a treaty norm applicable to the State parties.

29 See Art. 9 of the ICTY Statute and Art. 8 of the ICTR Statute.

30 Art. 27 of the Vienna Convention on the Law of Treaties 23 May 1969. Adopted in Vienna on 23 May 1969, and entered into force on 27 January 1980. United Nations, Treaty Series, vol. 1155, p. 331.

31 See Art. 59 of the ICJ Statute: The decision of the Court has no binding force except between the parties and in respect of that particular case.

32 Nuremberg Judgment, para. 447.

33 Ibid.

Relevance of official capacity in procedural terms was also an issue in ICJ case law, namely, the Arrest Warrant case, which concerned the immunity of a foreign affairs minister in a case of claimed crimes under international law.³⁴

In its decision in the Arrest Warrant case, the ICJ pointed out that the institute of immunities is a procedural one.³⁵ The immunities of State representatives originate from the principle of *par in parem non habet imperium* (lat. an equal cannot rule an equal), and thus correspond to the principle of sovereign equality.³⁶ Immunity as such is the right to be exempted, or the obligation to exempt a legal entity from the jurisdiction of a judicial body of another State or international organisation.³⁷ However, this principle has its limits, which depend on the aforementioned type of legal entity to which immunity belongs, as well as on the source of international law from which the granting of immunity originates.

High Representatives enjoy both functional and personal immunity. The granting, duration, and termination of personal immunity are governed by appointment to an office and remaining in it. The rule of absolute immunity applies indefinitely providing its bearer is in office. Thereafter, the rule of so-called relative immunity is applied, for which it is necessary to distinguish between immunity *ratione personae* and immunity *ratione materiae*.³⁸ Immunity *ratione materiae* applies if a representative of a State acts as a representative of their office, that is, to acts committed in an official capacity (acts performed in an official capacity).³⁹ In this case, the representative of the State is protected even after the end of their term in office, as their actions are covered by immunity, which is usually referred to as functional immunity.⁴⁰ Immunity *ratione personae* refers to the private conduct of the persons concerned, such as those of a head of State, who is protected only during their stay in office. After the termination of the position, this part of personal immunity expires and former representatives of the State can be summoned to court to account for their illegal actions, even for private actions committed during their time in office.

The stated content of the concept of immunities has evolved from the practice of States in the proceedings between states. Therefore, according to ICJ case law, a former high-ranking representative of a State can be summoned before a court other than the court of their State, if:

34 ICJ, Arrest Warrant Case (Democratic Republic of Congo v. Belgium), judgment, 11 April 2000 (Arrest Warrant Case).

35 Ibid., para. 60.

36 Compare UN Charter, Art. 2(1) See also ILC Report (Report of the Working Group on Jurisdictional Immunities of States and their Property), ILC *Yearbook* 1978, vol. II, 2, p. 153. See also Yang, 2012, p. 51.

37 Šturma et al., 2017, p. 9.

38 Akande and Shah, 2011, p. 817.

39 UN International Law Commission, The fourth report on Immunity of State officials from foreign criminal jurisdiction, 67th session, A/CN.4/686, 29 May 2015, p. 8.

40 Akande and Shah, 2011, p. 825.

1. *The former representative is exempted from immunity by the State he represents;*⁴¹
2. *It involves immunity ratione personae, which expires at the same time that the office is terminated; or*
3. *The proceedings relate to the prosecution of the most serious crimes under international law and the jurisdiction of the relevant international judicial body is given.*⁴²

In the *Krstić* case, the ICTY emphasised that immunity for crimes under international law can exist in the case of relations between States,⁴³ but that it would be wrong to suggest that it exists before international criminal courts.⁴⁴ However, this statement should be understood in relation to the fact that the *ad hoc* Tribunals were established by a resolution of the UN Security Council acting on the basis of Chapter VII of the UN Charter.

The situation differs in the case of an international court established by an international treaty. The ICC Appeal Chamber has adopted *Krstić* argument in respect to the practice of States, however, it has not distinguished different legal bases for the establishment of individual international criminal judicial bodies.⁴⁵ Nevertheless, as noted, the ICC was established by an international treaty and the principle of *nemo plus iuris transfere potest quam ipse habet* (Engl. no one can transfer more rights [to another] than he himself has) is still applicable. Therefore, if the States themselves are not able to prosecute a High Representative of another State, then an international judicial body, established by an international treaty, cannot do so either if the prosecution considers a High Representative of a third State as not being a party to that international treaty. The situation created or triggered by the UN Security Council is unique respecting that the UN Charter is also an international treaty: all States that are a party to the UN Charter have agreed to respect and apply resolutions of the UN Charter adopted under Chapter VII, which aim to protect or restore international peace and security.

41 Compare Art. 32 of the Vienna Convention on Diplomatic Relations, which concerns diplomatic representatives.

42 Arrest Warrant Case, para. 61.

43 See, for example, the issue of functional immunity, as outlined by the UN Commission for International Law in relation to the investigation of immunities of State officials from foreign criminal jurisdiction, where it is discussed in the context of interstate relations (i.e. the horizontal level), rather than that of relations between the State and the international court (i.e. the vertical level).

44 ICTY, *Prosecutor v. Krstić*, IT-98-33-A, Decision on Application for Subpoenas, Appeal Chamber, 1 July 2003, para. 26.

45 ICC, *Prosecutor v. Al Bashir*, situation in Darfur, Sudan, ICC-02/05-01/09-397-Corr, Appeals Chamber, 6 May 2019.

2.4. The fact that a person acted pursuant to order of his government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him

Even before the Second World War, there were national level cases where the superior order defence was granted,⁴⁶ albeit only under certain conditions. Therefore, it was possible to classify the responsibility of soldiers as so-called “conditional responsibility”.⁴⁷ However, the atrocities of Second World War led to the adoption of the so-called “absolute responsibility”, which barred the superior order defence as such. Consequently, relevant circumstances could only be considered as mitigating circumstances.⁴⁸ This was related to the fact that even though the orders were in accordance with national law, they exceeded the norms of natural law.⁴⁹ Moreover, the Nuremberg Tribunal only prosecuted the top officials, who had no superiors. However, the process of moral choice – a concept that became a part of the Nuremberg Judgment and the Nuremberg Principles formulated by the ILC – was appropriately examined during the Nuremberg process.⁵⁰

As the *ad hoc* Tribunals were based on the Nuremberg experience, their Statutes set out objective responsibility in relation to the superior order defence.⁵¹ That said, in the *ad hoc* Tribunals’ decision-making practice, efforts were made to make the content of this defence accessible through the defence of duress.⁵²

The experience of the *ad hoc* Tribunals influenced those responsible for drafting the Rome Statute, with the delegates at the Rome Conference adopting a compromise between absolute and conditional responsibility.⁵³ Under the Rome Statute, it is not possible to relieve a person of criminal responsibility for committing crimes within the jurisdiction of the Court unless two conditions are cumulatively met:⁵⁴ first, the objective existence of a legal obligation to execute an order of a relevant person about which the prosecuted person did not know to be illegal (subjectification of the conditions under examination); second, that the order itself was not manifestly unlawful. The objectification of the latter condition is emphasised in para. 2 of Art. 33

46 Leipzig Court, Llandovery Castle, Judgment, 16 July 1921, reprinted in *American Journal of International Law*, 1922, vol. 16, p. 708 et seq.

47 Gaeta, 1999, p. 174.

48 Art. 8 of the Nuremberg Charter.

49 Jackson, n.d.

50 Nuremberg Judgment, para. 447.

51 Art. 7 para. 4 of the ICTY Statute, Art. 6 para. 4 of the ICTR Statute according to which the superior order defence does not constitute a ground for excluding responsibility but may be considered a mitigating circumstance.

52 See, for example, ICTY, *The Prosecutor v. Erdemović*, case IT-96-22-T, T.Ch. sentencing judgment, 29 November 1996, para. 17. Also see the result of the duress issue in the Erdemović case in the sentencing judgment from 5 March 1998, para. 17, as analysed in Lipovský, 2021, p. 362.

53 Van Sliedregt, 2012, p. 292.

54 Cryer et al., 2010, p. 417.

of the Rome Statute, according to which orders to commit crimes against humanity and genocide are manifestly unlawful.

Differences in the establishing documents were influenced by the fact that Nuremberg was home to a military tribunal that prosecuted the top offenders for crimes that had already occurred, which significantly influenced on the institution and functioning of this Tribunal under rather ideal conditions.⁵⁵ The Hague Court is home to a criminal court with jurisdiction *pro futuro* and over offenders *en bloc* of the most serious crimes under international law.⁵⁶ Nevertheless, this developmental interplay has been traced.

Finally, to consider ICJ case law, one has to look into both individual and State responsibility and the interplay between them, as analysed in the Genocide Case.⁵⁷ The ICJ Genocide Case highlighted the distinction between these types of responsibility in the context of genocide. The ICJ pointed out that individual responsibility pertains to the accountability of specific persons for committing acts of genocide, as outlined in international criminal law, while State responsibility involves the attribution of responsibility to a sovereign entity for its role in or failure to prevent genocide. The Genocide Convention, a key legal instrument in this case, holds individuals criminally responsible for genocide, but allows for the attribution of State responsibility when certain criteria are met. Individual responsibility focuses on the culpability of individuals acting on behalf of the state, such as military or political leaders, who directly engage in or command genocidal acts. The ICJ clarified that State responsibility for genocide is distinct from the criminal responsibility of individuals, stressing the need to establish a direct link between the state's actions and the commission or prevention of genocide.⁵⁸ Specifically, State responsibility for genocide arises not merely from the acts of rogue individuals, but requires a demonstration of the state's involvement or complicity in the commission of genocidal acts. The same applies to individuals, who can be culpable even if they are not State agents; here, separate genocidal intent must be proven in their case. They are separated to prevent individuals from defending themselves by claiming that they were merely following State policy and decisions.

2.5. Any person charged with a crime under international law has the right to a fair trial on the facts and law

The Nuremberg Tribunal was built upon two pillars:⁵⁹ the first is the accountability of perpetrators of the most serious crimes under international law, while the second is the right to a fair trial processing that accountability. Art. 16 of the

⁵⁵ King, 2007, p. 655.

⁵⁶ Ibid.

⁵⁷ ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), judgment, 26 February 2007, ICJ Reports 2007, p. 43.

⁵⁸ Ibid., para. 379 et seq.

⁵⁹ Kirsch, 2007, p. 502.

London Charter provided for the rule of a fair trial for defendants in a brief provision specifying the requirements of a fair trial as a procedure that had to be followed, including provision of information of detailed charges at a reasonable time before the trial in a language understood by the defendant. From a current perspective, the Nuremberg process missed the right of appeal, among other things.⁶⁰

The Second World War, and subsequent legal developments, is considered a milestone in both international criminal law and international human rights law. In respect to legally binding treaties, the golden standard for a fair trial provision was achieved with the International Covenant on Civil and Political Rights (ICCPR).⁶¹ Adopted in 1966, the ICCPR article on a fair trial was an original article also within a draft of a Statute of the ICC.⁶² However, during the preparatory work, the rights of an accused within fair trial requirements were elaborated into a provision that went even further than Art. 14 of the ICCPR.⁶³ Moreover, apart from Art. 67 of the Rome Statute, which stipulates the rights of an accused individual, the current legal framework of the Rome Statute includes applicable law as specified by Art. 21 of the Statute, in accordance with internationally recognised human rights, rights of suspects, and detailed Rules of Procedure and Evidence.

However, for the fair trial requirements, the innovative approach within the Rome Statute is not the enrichment of Art. 14 of the ICCPR, but the particularity of the rights of victims, namely, their participation in the proceedings.⁶⁴ This specific approach to the proceedings can be observed also in the case law of the ICJ concerning the rights of an individual to be informed about and receive consular assistance.⁶⁵ The ICJ emphasises that the wording of the Vienna Convention on Consular Relations, a classical interstate international treaty, directly establishes the rights of an individual to consular assistance.⁶⁶

60 See Art. 26 of the Nuremberg Charter, according to which the Judgment shall be final and not subject to review. Therefore, all appeals were denied. Apart from these specific fair trial shortcomings, the bulk of criticism was directed towards general principles of criminal law as not having been applied (i.e. *nullum crimen/poena sine lege*).

61 UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations Treaty Series, vol. 999, p. 171.

62 See also Art. 21 of the ICTY Statute and Art. 20 of the ICTR Statute.

63 For example, the right of the accused to make an unsworn oral or written statement in their defence, and not to have imposed on themselves any reversal of the burden of proof or any onus of rebuttal.

64 See Art. 68 of the Rome Statute on the protection of the victims and witnesses and their participation in the proceedings. See, for example, Ciorciari, Heindel, 2016, vol. 56.

65 ICJ, LaGrand, Germany v. United States of America (LaGrand Case), 27 June 2001, ICJ Reports 2001, p. 466.

66 Ibid., Art. 36 para. 1 (b): 'if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph'.

2.6. Crimes under international law

Given the limited scope of this subsection, this principle is presented in terms of the schematic differences between definitions of core crimes in the Nuremberg Charter and their subsequent formulation in the establishing document and the ICC.⁶⁷

2.6.1. Crime against peace, nowadays known as the crime of aggression

The crime of aggression has probably been the most controversial crime under international law.⁶⁸ In the Nuremberg Principles enshrined in the Nuremberg Charter, the ILC defines the crime of aggression based on the reasoning that when an act is considered illegal by international law (the so-called Briand-Kellog Pact having outlawed war as an instrument of national policy), those who plan, initiate, or conduct this act have committed a crime and must be held criminally responsible for crimes against peace.⁶⁹

As noted, however, the Nuremberg Tribunal involved the prosecution of crimes that had already happened, whereas ICC jurisdiction is only applicable to *pro future* cases. Controversies concerning this crime under international law thus emerged also during the Rome Conference, creating a situation where plenipotentiaries were unable to agree on a definition of the crime of aggression and the conditions of Court jurisdiction in this case.⁷⁰ Most discrepancies were overcome during the Review Conference in Kampala, where, despite all sorts of exceptions and conditions, a definition of the crime of aggression was finally adopted. The adopted definition is much longer than the Nuremberg understanding of crime against peace. The Kampala Review Conference also saw ICC jurisdiction over the crime of aggression subject to more constraints than had been anticipated.⁷¹ The definition reflects historical developments. In principle, it points out and comprehends relevant parts of the Nuremberg Charter concerning the crime against peace (not expressly), the UN Charter, and UN General Assembly Resolution 3314 (XXIX) of 14 December 1974, which defined acts of aggression.

67 The Statutes of *ad hoc* tribunals are excluded because *ad hoc* Tribunal jurisdiction *ratione materiae* does not include this crime under international law.

68 Tomuschat, 2006, p. 830.

69 Nuremberg Judgment, para. 445 et seq.

70 The outcome was verbalised in Art. 5 of the Rome Statute, according to which the Court has jurisdiction with respect to the crime of aggression, but shall only exercise it once this crime is defined and the conditions of exercising the Court's jurisdiction are established.

71 In brief, the ICC can exercise jurisdiction over the crime of aggression if it is committed after one year following the ratification of the amendments by thirty States Parties, a special activation decision is adopted by the majority of States Parties, there is no opt-out by a State Party, and if no determination of an act of aggression is provided by the UN SC within six months of notifying the UN Secretary-General.

More importantly, at a session held in New York on 14 December 2017, the Assembly of States Parties adopted a resolution to activate the jurisdiction of the Court over the crime of aggression. This jurisdiction has been effective since 17 July 2018, although under very strict conditions.⁷²

2.6.2. War crimes

Conceptually, war crimes were the least controversial type of crime when the Nuremberg Charter and subsequent Statutes were adopted. “War crimes” was recognised as a legal term even before the Second World War. The Nuremberg Tribunal based its judgement on the Hague Convention of 1907,⁷³ and the Geneva Convention of 1929.⁷⁴ When the Geneva Conventions of 1949 were adopted, the term “grave breaches” was used instead, although it was only in the Additional Protocol I to the Geneva Conventions that it was declared that “grave breaches” constitute war crimes.⁷⁵

A war crime is a crime that is only committable during an armed conflict.⁷⁶ The legal framework of war crimes underwent considerable development within the jurisprudence of *ad hoc* Tribunals, mainly the ICTY.⁷⁷ However, although Art. 8 of the Rome Statute is considered to be the most complex legal norm dealing with war crimes,⁷⁸ it has not overcome the division of war crimes according to the type of armed conflict and according to the legal norm from which it originated. From this, it follows that war crimes can be categorised into those committed during an international armed conflict and those committed during a non-international armed conflict,⁷⁹ and into those covered by international treaty law and war crimes covered by international customary law.⁸⁰ Despite the ICTY’s decision that the use of prohibited weapons is illegal in both international and non-international armed conflicts,⁸¹ political representatives at the Rome Conference voted for separate categorisation because not all States are party to all treaties concerning, for example,

72 A very strict position was adopted, whereby the Court has no jurisdiction over an alleged crime of aggression if committed either on the territory or by a national of a State Party to the ICC Statute, if this State has not ratified the Kampala amendments. See Kress, 2018, vol. 16.

73 Art. 46, 50, 52, and 56 of Hague Convention 1907. Nuremberg Judgment, para. 467.

74 Art. 2, 3, 4, 46, and 51 of Geneva Conventions 1929. Ibid.

75 Art. 85 para. 5 of the Additional Protocol I from 1977.

76 ICTY, Prosecutor v. Dragoljub Kunarać et al., Judgment, 12 June 2002, IT-96-23/1-A, para. 57–59

77 La Haye, 2008, p. 112.

78 This is a complex issue. For the inclusion of war crimes committed during non-international armed conflicts and a detailed account of some war crimes, see Schabas, 2011, p. 125.

79 See Art. 8 para. 1 let. (a) and (b) of the Rome Statute for international armed conflicts, and Art. 8 para. 1 let. (c) and (e) of the Rome Statute for non-international armed conflict.

80 See Art. 8 para. 1 let. (a) and (c) of the Rome Statute for international treaty law, and Art. 8 para. 1 let. (b) and (d) of the Rome Statute for international customary law.

81 ‘What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife’. ICTY, Appeals Chamber, Prosecutor v. Duško Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, IT-94-1-AR72, para. 119.

the prohibition of certain weapons. Nevertheless, they adopted Art. 8 para. 2 let. (xx), allowing for the adoption of completing amendments.⁸²

Finally, what is very important in relation to war crimes within the Rome Statute as a milestone in the development of international criminal law, the jurisdiction of the ICC is limited by a qualitative and quantitative factor expressed in Art. 8 when requiring a connection with a plan or large-scale commission of war crimes, although only in particular when there is such a connection.⁸³

2.6.3. *Crimes against humanity*

When the Nuremberg Charter was adopted, “crimes against humanity” was a term related to the law of humanity and dictates of public conscience.⁸⁴ As for the Nuremberg Judgment, the Nuremberg Tribunal actually convicted only defendants for crimes against humanity that had been committed during the war.⁸⁵ The connection with war was upheld by the ILC when formulating the Nuremberg Principles and in the ICTY Statute as well. It was in the later ILC work on the Code of Crimes against the Peace and Security of Mankind when the commission during wartime is not required and when the term “systematic and mass violation” was introduced.⁸⁶ It was subsequently adopted in a legally binding way in the ICTR Statute.⁸⁷ The Rome Statute confirmed this approach, whereby the widespread and systematic attack of organisational character, i. e. demonstrating policy element, is required to achieve the threshold of a crime against humanity. The requirement of an attack against any civilian population features in all of the documents mentioned here. It is also present in the draft convention on the prevention and punishment of crimes against humanity, which was adopted by the Commission in 2017 to fill the gap in the international legal framework resulting from the fact that crimes against humanity were the only core crime under international law solely criminalised by international customary law.⁸⁸

82 Provided they are of a nature to cause superfluous injury or unnecessary suffering or are inherently indiscriminate in violation of the international law of armed conflict.

83 ‘The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes’ (italics added by author).

84 See Meron, 2000, vol. 94, p. 78.

85 Nuremberg Judgment, para. 468.

86 The term was not included already in the 1954 Draft. It was but during first introduced in the ILC meeting in 1991, although where it was presented used in relation to the systematic or mass violations of human rights. See Report of the International Law Commission on the work of its forty-third session (29 April–19 July 1991), A/46/10, p. 103.

87 The ICTR Statute also requires a discriminatory motive.

88 First report on crimes against humanity, by Sean D. Murphy, Special Rapporteur, ILC, 67th session, A/CN.4/680, para. 10.

2.6.4. *Crime of genocide*

Although considered crime of crimes under international law, the crime of genocide was not even mentioned in the Nuremberg Charter. Genocide as a crime under international law was first defined after the Nuremberg Tribunal, namely, in the Convention on the Prevention and Punishment of the Crime of Genocide, which was adopted by the UN General Assembly on 9 December 1948 as General Assembly Resolution 260, and entered into force on 12 January 1951. This definition was first analysed by judicial bodies in the Yugoslavian and Rwandan context. Although there were various interpretative efforts by *ad hoc* tribunals,⁸⁹ the essence of this crime went unchallenged. Although various proposals were made to broaden the list of protected groups during the drafting of the Rome Statute, the same definition was eventually adopted.

2.7. *Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law*

This principle could probably have been merged with the first principle in this subsection, which analysed the commission of a crime *per se*. However, to maintain structural coherence, this section examines the interplay between the Nuremberg Charter and the Rome Statute in respect to the principle of complicity.

Complicity is a legal institute that is, at most, related to the criminal law element of international criminal law. Nevertheless, a systematic feature of the commission of a crime under international law is the requirement of individual criminal responsibility. According to the Nuremberg Tribunal, the relevant provision in the Charter did not add a new and separate crime to those already listed. In the view of the Nuremberg Tribunal, the provision was designed to ‘establish the responsibility of persons participating in a common plan’.⁹⁰ However, in assessing the guilt of the individual perpetrators, the Nuremberg Tribunal used language consistent with the concept of “complicity” in the criminal law.⁹¹

The phrase “participation in a common plan” influenced further developments of attribution to a crime within the jurisprudence of the *ad hoc* Tribunals, as well as the later drafting of the Rome Statute. The leading ICTY judgement on this issue was the decision on the Tadić Appeal in 1999, where the ICTY reviewed State practice and determined that there was a customary law basis for common purpose culpability, which could be divided into three categories: namely, co-perpetration with participants having the same criminal intent; so-called “concentration camp” cases; and joint criminal enterprise, where the commission of a crime occurs outside the

89 ICTR, *The Prosecutor v. Akayesu*, Judgment, 2 September 1998, ICTR-96-4-T.

90 Nuremberg Judgment, para. 449.

91 Ibid., for example, paras. 281, 416, 417, 489, 506.

common purpose but as a foreseeable outcome of it.⁹² The ICC did not adopt the same approach within Art. 25 para. 3 let. (d) of the Rome Statute. Where the ICC focused on the objective element of a crime, the ICTY emphasised the subjective element of a crime committed as part of a joint criminal enterprise.⁹³ Accomplices are dealt with in detail in Art. 25 para. 3 let. (b) and (c) of the Rome Statute.

As in the case of the previous Nuremberg Principles, the Nuremberg Tribunal can be considered a key milestone. Generally speaking, however, it was a *sui generis* situation, the circumstances of which have not been repeated. Nonetheless, its approach to the basic principles of international criminal law was so innovative and persuasive that its successors have continued to build on it, either by accepting and developing it or by challenging and overruling it.

3. Actual Interplay

Having discussed the interplay between the ICC and other international courts and tribunals from a historic developmental perspective as a material source of law, it is necessary to consider the Nuremberg Principles as a formal source of law.⁹⁴

3.1. The Nuremberg Principles as a formal source of law

Although there were only fifty-five UN Member States when the UN General Assembly affirmed the Nuremberg Principles as principles of international law recognised by the London Charter of the Nuremberg Tribunal and the Judgment of the Nuremberg Tribunal itself,⁹⁵ it was strongly believed that, despite various opposing opinions,⁹⁶ the Nuremberg Principles were evidence of (general) practice accepted as law.⁹⁷ It is generally necessary to present *usus longaevus* of an undefined length and *opinio juris* to prove the existence of an international custom.⁹⁸ However, despite general scepticism regarding so-called instant custom, the Nuremberg Tribunal and its outcomes provided an extraordinary opportunity to change the paradigm

92 ICTY, Prosecutor v. Duško Tadić, Judgment, 15 July 1999, IT-94-1-A, para. 220.

93 The ICTY specifically noted this article of the Rome Statute when introducing the notion of joint criminal enterprise. See *ibid.*, para. 222.

94 For material sources of international law, see Valuch, Vršanský.

95 UN General Assembly resolution 95 (I) adopted 11 December 1946.

96 Krivokapić, 2017, vol. 9, pp. 81–98.

97 Compare Art. 38(1)(b) of the ICJ Statute.

98 ICJ, North Sea Continental Shelf, Federal Republic of Germany/Denmark, 20 February 1969, ICJ Reports 1969, para. 77.

of international law.⁹⁹ The status of the Nuremberg Principles as customary law has been confirmed by both national courts¹⁰⁰ and international judicial bodies.¹⁰¹

In view of the foregoing, it is necessary to examine whether international judicial bodies have applied the Nuremberg Principles. Art. 38 of the ICJ Statute is not only important as a list of applicable laws for the ICJ itself, but is generally perceived as a non-exclusive list of sources of international law, despite the criticism levelled against it.¹⁰² If the Nuremberg Principles are considered part of international custom, we would expect their normative status to be assessed in the case law of international judicial bodies. However, this has not been the case.

Research on the Nuremberg Principles themselves suggests that the *ad hoc* Tribunals took into account the case law of the Nuremberg Tribunal and the articles establishing the Nuremberg Charter.¹⁰³ This is understandable given the fact that the Nuremberg Principles were prepared as a formulation of the principles of international law recognised by the London Charter of the Nuremberg Tribunal, an international establishing treaty, and the Judgment of the Nuremberg Tribunal. The question might also be raised as to whether this Judgment created a precedent within international law. Regarding the precedent system on the international level, it is generally accepted that precedents are not applied by the ICJ, for example, because its judgements are only legally binding for the parties to the dispute.¹⁰⁴ However, the ICJ follows its previous decisions because of the consistency needed to settle its jurisprudence.¹⁰⁵

Nevertheless, general theory of precedents has to be analysed. Judgements are considered a source of law under the condition that they are law-making acts.¹⁰⁶ If a decision only applies pre-existing substantive law, it is not a law-making act but an act of its interpretation or application.¹⁰⁷ Although there were several disputed matters, especially in relation to crimes against peace, the Nuremberg Tribunal reiterated several times that it had not created new law but applied law adopted by the international community and individual States before its establishment.¹⁰⁸ However, even if the Nuremberg Tribunal itself did not create a new law, such a law-making act might be declared by the adoption of the London Charter, rather than of the

99 Scharf, 2014, vol. 2, pp. 305–341.

100 Supreme Court of Israel, Attorney General of Israel v. Eichmann, (1962) 36 ILR 277.

101 European Court of Human Rights, Kolik and Kislyiy v. Estonia, Decision on Admissibility, 17 January 2006.

102 Thirlway, 2006, p. 119.

103 For a list of judgements of international judicial bodies considering the Nuremberg Charter, Nuremberg Judgment, or Nuremberg Principles as such, see, for example, <https://www.legal-tools.org/doc/d6b92c-1/pdf/> last accessed on 22 November 2023.

104 See Art. 59 of the ICJ Statute.

105 Brownlie, 2008, p. 21.

106 Kelsen, 2007, p. 149.

107 Compare Kelsen, 1947, vol. 1, p. 154.

108 Nuremberg Judgment, p. 52.

Judgment.¹⁰⁹ Regardless, the Nuremberg Judgment was not a precedent to be legally followed.

3.2. Reference to the Nuremberg Principles in the case law of the ad hoc Tribunals

As noted, the establishing documents of the Statutes of the *ad hoc* Tribunals include all of the Nuremberg Principles. Indeed, Art. 7 of the ICTY Statute contains nearly identical iterations of almost all seven principles. The Nuremberg Tribunal and its outcomes, including the formulation of the Nuremberg Principles, served as the material foundation of the ICTY Statute.¹¹⁰ As such, while they constituted the main source material, the drafters had no reason to refer to the Nuremberg Principles themselves in drafting the ICTY Statute.¹¹¹ In its case law, the ICTY primarily refers to its Statute, although it was only a framework document pertaining to practical work and required extensive interpretation.¹¹²

Nevertheless, the *ad hoc* Tribunals had to consider the previous experiences of the international community, particularly when the defence referred to such experiences.¹¹³ Therefore, the ICTY analysed the value given to judicial decisions as well-established sources of international law.¹¹⁴ It followed the position considering judicial decisions as a subsidiary means for the determination of rules of law.¹¹⁵ However, it could not hold it as a distinct source of law in international criminal adjudication because a doctrine of binding precedent presupposes a certain degree of hierarchy absent between the *ad hoc* Tribunals and Nuremberg Tribunal.¹¹⁶ Of course, the situation was different in respect to the hierarchical system between the ICTY Trial Chambers and Appeal Chamber. In this case, the system of precedents is to be applied, as has been confirmed by the ICTY itself, due to the need for certainty and predictability.¹¹⁷

The ICTY Trial Chamber pointed out other reasons to scrutinise the decisions taken by other international criminal tribunals, including the Nuremberg Tribunal.¹¹⁸ First, they may constitute evidence of an international custom or a general principle of international law.¹¹⁹ Second, they may provide persuasive authority that the de-

109 Kelsen, 1947, p. 154 et seq.

110 Cryer et al., 2010, p. 123.

111 Ibid.

112 Whiting, 2011, p. 83 et seq.

113 ICTY, Appeals Chamber, Prosecutor v. Duško Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, IT-94-1-AR72, para. 95 ff.

114 ICTY, Chamber, Prosecutor v. Kupreškić, Judgment, 14 January 2000, IT-95-16-T, para. 540.

115 Ibid.

116 Ibid.

117 ICTY, Appeals Chamber, Prosecutor v. Aleksovski, Judgment, 24 March 2000, IT-95-14/1-A, para. 113.

118 Kupreškić, para. 540.

119 Ibid.

cision taken by the ICTY concerning the existence of a legal norm was a correct interpretation of existing law.¹²⁰ Essentially, the ICTY noted that all international criminal courts should be very careful when analysing and referring to decisions of other courts before relying on their authority as to existing law.¹²¹ Nevertheless, the ICTY recognised that their experience is of invaluable importance for the determination of existing law.¹²² This is especially true of the Nuremberg Tribunal, which operated via international instruments in laying down provisions that were either declaratory of existing law or had gradually transformed into an international custom.¹²³

The ICTR Statute and its case law followed the same approach as the ICTY, with the two *ad hoc* Tribunals sharing similar establishing documents and the same Appeals Chamber. As such, the ICTR Statute contains the provision covering individual criminal responsibility and all the relevant Nuremberg Principles relating to it, including no immunity for State officials, superior order defence, fair trial, and jurisdiction *ratione materiae* specifically determined by the situation that was supposed to be dealt with, namely, the Rwandan genocide.¹²⁴ Moreover, the Appeals and Trial Chamber(s) of the ICTR often referred to the Nuremberg Charter or the Nuremberg Judgment, especially in the beginning.¹²⁵

3.3. Reference to the Nuremberg Principles in ICC case law

The situation is different for the position of the Nuremberg Principles and their legal status in ICC case law. Notably, while the Rome Statute included all of the Nuremberg Principles, the ICC was established on the basis of an international treaty, not on the basis of a UN Security Council resolution, which is comparable to the source of the creation of the Nuremberg Tribunal. The Rome Statute is also a much more detailed and elaborate document. In terms of the focus of this chapter, it is important to note that the Rome Statute explicitly addresses the issue of applicable law before the ICC.¹²⁶

Art. 21 of the Rome Statute precisely determines the law that the ICC shall apply. Although starting from the end, the first point to note in this respect is that any interpretation and application of law has to be consistent with internationally recognised human rights and without any discrimination.¹²⁷ In the Rome Statute itself, Elements of Crimes and Rules of Procedure and Evidence are the primary sources of

120 Ibid.

121 Ibid., para. 542.

122 Ibid., para. 541.

123 Ibid.

124 Art. 8 of the ICTR Statute.

125 See, for example, ICTR, Trial Chamber, Prosecutor v. Akayesu, ICTR-96-4-T, Judgment, 2 September 1999, para. 486, 526, 550, 563.

126 Bitti, 2009, p. 412 et seq.

127 Compare Art. 21 para. 3 of the Rome Statute.

applicable law.¹²⁸ This means that the ICC is expressly instructed to follow first and foremost this troika of legal norms. Only where appropriate, are applicable treaties and the principles and rules of international law applied in the second place. This raises the question of whether the Nuremberg Principles or the Nuremberg Judgment might be found somewhere in these options of law applied by the ICC.

As noted, the Nuremberg Principles are considered international custom. Consequently, if there is a gap in the highest hierarchical group of applicable legal norms, then rules of international law are applied, including customary rules. A different reasoning is to be used in relation to previous decisions of other international judicial bodies. Art. 21 sets forth only the applicability of principles and rules of law as interpreted in the previous decisions of the ICC itself.¹²⁹ Moreover, the use of previous decisions in its decision-making is discretionary, not a legal duty. Therefore, formally speaking, even though a hierarchical system of Trial Chambers and the Appeal Chamber has been established,¹³⁰ no system of precedents is applied within the system created by the Rome Statute.

Finally, Art. 21 of the Rome Statute makes no mention of previous decisions of other international courts. Insofar as the Rome Statute provides applicable law, there is no reason to refer to the jurisprudence of other tribunals.¹³¹ However, the ICC does not exist in isolation within the system of international criminal law.¹³² Therefore, like the *ad hoc* Tribunals, the ICC might be inspired by the case law of other international criminal tribunals and also hybrid courts and might identify principles and rules of international law while analysing the jurisprudence of other courts and tribunals.¹³³ Although the first President of the ICC underscored the importance of their legacy, the language of Art. 21 of the Rome Statute does not provide many opportunities to return to the Nuremberg Principles as a formal source of law.¹³⁴

4. Conclusion

The interplay between the ICC and other international courts and tribunals in respect to the Nuremberg Principles reflects complex legal relationships and highlights several issues that impact the prosecution of international crimes. The Nuremberg

128 Compare Art. 21 para. 1 of the Rome Statute.

129 Compare Art. 21 para. 2 of the Rome Statute.

130 Excluding Pre-Trial Chambers, which have a different function within the established ICC system.

Compare Part 5 and Part 6 of the Rome Statute, especially Art. 57 and Art. 64 of the Rome Statute.

131 ICC, Situation in Kenya, ICC-01/09-19-Corr., Pre-Trial Chamber II, 2010, Dissenting Opinion of Judge Hans-Peter Kaul, para. 29.

132 Ibid., para. 30.

133 Ibid.

134 Kirsch, 2007, p. 502 et seq.

Principles confirmed individual criminal responsibility at the international level and its consequences, such as irrelevance of official capacity or no superior order defence. These principles influenced subsequent developments in international law, including the wording of the *ad hoc* Tribunals Statutes and the Rome Statute, which founded the ICC in 1998. They have thus been considered as foundational to and included in the basis of various international criminal judicial bodies.

The interplay discussed in this chapter can also be observed in relation to the ICJ. A principal judicial organ of the UN, the ICJ is responsible for resolving disputes between States and providing advisory opinions. Although this means that its jurisdiction differs from that of the ICC, the ICJ influences the interpretation of international law norms relevant to the ICC. Its case law, such as the Arrest Warrant case, has addressed immunity and jurisdictional issues that intersect with the ICC's mandate, shaping the evolving landscape of international criminal and humanitarian law. The role of the ICJ in interpreting customary international law also impacts how the ICC apply legal standards and contributes to the coherence of international jurisprudence.

This interplay extends beyond criminal proceedings, particularly when considering fair trial requirements and collaboration in relation to addressing the broader consequences of international crimes. Over the course of its historical development, this interplay has been shaped by principles like those established at Nuremberg. Although not a formal source of law for subsequent criminal judicial bodies, as they are considered customary law, the Nuremberg Principles could be referred to by the ICJ.

Finally, the networks and related interplay examined in this chapter reflect a dynamic legal landscape committed to promoting accountability, justice, and the protection of human rights around the world.

Justice imbues international law in both its criminal and international law aspects, as justice renders to everyone his due.¹³⁵

135 *Iustitia suum cuique distribuit* (lat.) Marcus Tullius Cicero, *De Natura Deorum*.

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CHAPTER 5

POSITION OF THE PROSECUTOR BEFORE THE INTERNATIONAL CRIMINAL COURT: CHALLENGES AND DE LEGE FERENDA POSTULATES



BARBARA JANUSZ-POHL

Abstract

This study analyses the position of the International Criminal Court (ICC) prosecutor, using two theses as the prism of the study. According to the first thesis, the position of this figure is closely linked to the structural “fluctuability” of proceedings based on the Rome Statute. The second thesis argues that the ICC prosecutor has a dualistic role, being both an officer of justice and a party to the jurisdictional proceedings. Within this role, the principle of opportunism plays a pivotal role. Simultaneously, that the gradual opportunism formula has been adopted is recognised. Thus, the examination of the advisability of prosecution becomes less critical as the proceedings progress. In this context, the prosecutor’s position is outlined against the background of the effectiveness of procedural functions. This paper consists of five parts: introduction, description of the model and the main research theses, compact overview of the essential formulas of the prosecutor’s activities, critical examination of selected prosecutorial actions, and final remarks. Among other things, the last propositions include a recommendation to reconsider modifying the accusatory principle by increasing prosecutorial discretion. This overview ignores the interaction between ICC bodies and the UN Security Council, as the mechanisms provided for in the Rome Statute

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to block prosecution by the Security Council's decision is considered to have political rather than legal connotations.

Keywords: ICC prosecutor, opportunism, directionality of prosecutor, accusatorial principle, statute, prosecutorial activities, structural fluctuability

1. Introduction

Two central and fundamental questions are addressed in this study: What role does the International Criminal Court (ICC) prosecutor play in the model of proceedings before the ICC, and does the adopted formula enhance the effectiveness of this procedure? Additionally, in this study, effectiveness is perceived as a comprehensive construct that encompasses the economic, temporal, and axiological dimensions. In this sense, effectiveness also refers to values that correspond, on the one hand, to the principle of objectivity and material truth and, on the other hand, to the right to defence principle.

To answer these questions, a few assumptions must be made. First, this study adopts the dynamic perspective; thus, the prosecutor's role is observed based on subsequent phases of the proceedings. We specifically focus on the investigation and accusation models. Nevertheless, the study adopts an idealistic and provocative approach, namely, the controversial issue of achieving international consensus regarding the reshaping of the procedure is reconsidered (although it seems almost impossible, as it implies the amendment of the Rome Statute and achieving consensus of State parties to this treaty). Consequently, a few proposals *de lege ferenda* are presented.

The following hypotheses are adopted to address the main issue. The prosecutor of the ICC plays a double role in the type of procedure at hand (being simultaneously the investigative authority and subsequently a party to the trial). Based on the provisions of the Rome Statute (hereinafter, RS or Statute), the ICC prosecutor is an organ of the ICC and the justice officer of justice acting under the supervision of the Pre-Trial Chamber (PTC) during the preparatory stage (predominantly regarding the subject matter of the case).¹ Consequently, the role of the justice officer influences the ICC prosecutor's position as a party before the Trial Chamber (TC).

This study shows that the more the procedure advances, the less discretion remains in the prosecutor's hands.² This refers to the five subsequent phases of the proceedings: preliminary examination of a situation; commencement of investigation

1 Ambos, 2000, pp. 98–101.

2 See: Schabas, 2008; Brubacher, 2004; Ambos, and Bock, 2012; Greenawalt, 2007; Coté, 2005; Jallow, 2005.

(including proceedings *proprio motu*); commencement of prosecution (requesting the arrest warrant or summons to appear); confirmation of charges; and commencement of trial before the TC. In this study, due to the need to select issues, we concentrate on pre-trial proceedings only within the context of the accusatory principle. Some remarks will be made regarding the position of the prosecutor in judicial proceedings.

2. Position of the ICC Prosecutor Based on the Adopted Model of Procedure: Structural Fluctuability and Gradual Opportunism

In discussing the issue of effectiveness, the realisation of the prosecutorial function must be juxtaposed with the challenges that refer to the model of the given procedure, so-called structural challenges.³ These challenges can be summarised as structural fluctuability and gradual opportunism.

To understand these two phenomena, one should note that the procedure before the ICC is a unique hybrid of common law and civil law constructs and, consequently, is “less framed” than the typical common law or civil law repressive model of investigation or prosecution.⁴ What does it mean to be “less framed”? The transition from one phase to another subsequent phase of the proceedings before the ICC is more flexible than that based on typical continental law or common law criminal procedures.⁵ Following the latter examples, it is evident when the pre-trial and judicial stages begin (continental law proceedings) or when the trial before the court commences and pre-trial activities terminate (common law systems).

An additional typical feature of the analysed model (but somehow linked with structural fluctuability) concerns the protective approach that refers to the position of the prosecutor as a *dominus litis* in the pre-trial stage balanced by the activity of the PTC. This balance is coherent with the claim of protecting “the future defendant” – the claim not to stigmatise the latter until the judicial stage starts. This refers to the selective nature of criminal responsibility before the ICC, under which offenders in leadership positions, and thus with specific political influence or having social position and support (even if lost at the time of the proceedings), are prosecuted. Therefore, the very fact of bringing them to justice might be controversial for specific sectors of society.⁶ These are people who, metaphorically speaking, “have blood on their hands”, but most often, they are not the direct perpetrators of atrocity crimes. Therefore, charging them occurs in a somewhat specific series of steps.

3 Cf. Janusz-Pohl, 2022.

4 Cf. Kress, 2003.

5 Eser, 2008; Damaska, 1973; Langer, 2004; Luna Erik, 1999.; Packer, 1964.

6 See: Kuczyńska, 2014.

Unlike in continental pre-trial proceedings, where pressing charges formalises a suspect's status, in pre-trial proceedings conducted by the ICC prosecutor, the actions of criminal prosecution are directed towards a specific person starting at the time of the issuance of an arrest warrant or summons to appear by the PTC. The charges are approved by the PTC through a particular confirmation procedure as part of the final phase of the pre-trial proceedings, which, when referring to continental systems, corresponds to the phase of building an indictment.

Eventually, the procedure's structural fluctuability might provoke doubts regarding external transparency (external in terms of the international community and private participants in global justice from various legal systems). Given the international community, particularly non-professional actors, it may not be apparent when a pursued person acquires the status of a suspect in this type of proceeding. Moreover, a dualism of pre-trial organs, that is, the ICC prosecutor on the one hand and the PTC on the other, requires clarification as to who is a tutor of "substantive truth". In this study, a hypothesis on "gradual opportunism" in the negative formula is adopted. It asserts that opportunism is greatest at the beginning of the procedure, mainly within the choice of the situation to be examined and investigated, and then against whom the arrest warrant or summons to appear is to be issued.⁷ Opportunism diminishes as the proceedings progress, in the sense that once the charges are confirmed (final stage of pre-trial), the imperative (obligation) to hold the real perpetrators of atrocity crimes criminally accountable based on the principle of substantive truth is affirmed.

To clarify the identified theses regarding structural fluctuability and gradual opportunism, we must briefly refer to the model of proceedings adopted under the Rome Statute. After all, these theses stem directly from the assumed model of proceedings, which is widely considered a hybrid combination of features referring to continental and common law procedures.⁸

Let us start the inquiry by formulating a few general remarks on the elements of the model of proceedings at hand. For the scope of this analysis, four elements that determine the model are pivotal: composition of the proceedings (stages-oriented approach), position and interferences of participants (personal composition of trial approach), set of guarantees for participants (guarantees-oriented approach), and finally, principles of this type of procedure (values-oriented approach).⁹

For the scope of this analysis, the following principles must be considered: a) the principle of opportunism v. legalism; b) the principle of complementarity; c) the principle of material truth; d) the accusatorial principle; e) the balance of inquisitorial and adversarial principles; f) the principle of objectivity; g) *onus probandi*; h) the principle of collective action v. the principle of individual actions. A detailed

7 Kuczyńska, 2014, p. 187.

8 Kress, 2003.

9 Janusz-Pohl, 2022.

discussion of these principles is beyond the scope of this study. Therefore, we highlight a few observations that will serve as the basis for further research.

The first group of principles includes a) opportunism v. legalism, b) complementarity, and c) the principle of material truth, which interfere with each other. However, they remain closely connected to the hypotheses proposed in this study regarding gradual opportunism.

Admittedly, the initiation of proceedings is based entirely on the principle of opportunism, as the ICC's jurisdiction is complementary to national jurisdictions.¹⁰ Moreover, the adopted criminal liability formula is selective, not universal; however, all authorities' decisions must be based on factual findings consistent with objective reality (context of truth principle). As the proceedings progress (after the case and defendants have been selected, and especially after the charges have been approved and proceedings have been initiated), the imperative to establish the truth about the selected perpetrators strengthens. This tendency is also reflected in the so-called evidentiary thresholds. According to this approach, a warrant of arrest shall be issued under 'reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court'; the confirmation of the charges shall be approved when there is 'sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged' (Article 61(7) of the Statute).¹¹

Regarding the second group of principles, the issue of the accusatory principle and the inquisitorial and adversarial principles remains closely connected to the hypothesis of the structural fluctuability of procedure. As indicated earlier, the specific combination of the features of inquisitorial and adversarial processes, and therefore the specific design of the accusatory principle, determines the lack of formalised and precise transitions between the stages of these proceedings. The balance between inquisitorial and adversarial bias is apparent in several elements (examined in the following sections). However, it is most clearly manifested within the relationship between the ICC prosecutor and the PTC, and the cumulation of this unique interaction concerns the institution of confirmation of charges.

Hence, in the third group of relevant principles, one shall include the principle of *onus probandi*, the principle of objectivity with regard to the rule *in favour defensionis*, and the principle of collective actions v. individual actions. Thus, this group concerns

10 This study overlooks the context of the UN Security Council's powers obstructing prosecution before the ICC, that is, the issues regulated by Article 16 RS, according to which 'no investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions'. It was considered that the indicated mechanism has political rather than legal connotations; hence, in this context, this institution has a status external to the model of proceedings at hand.

11 For the description of probability threshold, see: Prosecutor v. Lubanga, ICC A. Ch. I, 13 June 2007, para. 14; Prosecutor v. L. Gbagbo, ICC PT. Ch. I, 3 June 2013, para. 17; Prosecutor v. L. Gbagbo, ICC PT. Ch. I, 12 July 2013, para. 35.

the specific activities of the ICC prosecutor examined in this study. Therefore, we refer to them in the discussion to the extent necessary.

However, since the central thesis of this study refers to gradual opportunism, let us focus here on a few initial remarks concerning the angles of opportunism. We note that opportunism presupposes an examination of the purposiveness of the actions taken by a given body (predominantly actions related to the initiation of the penal response). Meanwhile, legalism, particularly in the so-called “substantive legalism” version, assumes the automaticity of action in response to the infringement of the criminal law norm.¹² Given this general perspective and considering the principle of complementarity of the ICC’s jurisdiction concerning national criminal courts, the initiation of proceedings is undoubtedly based on the principle of opportunism. Thus, the prosecutor has full discretion regarding whether to prosecute a given situation and, subsequently, a case. As the literature emphasises, prosecutorial discretion can be defined as the power of a prosecutor to make autonomous (independent or impartial) choices as to when to start a preliminary investigation and whom to incriminate, on which charges, based on what evidence, and at what moment in time, within a given legal framework.¹³

Thus, to summarise, in the context of proceedings before the ICC, two aspects of opportunism can be distinguished: 1) the substantive dimension of opportunism, which refers directly to the situation to be researched, and 2) the subjective dimension of opportunism relating to the case to be investigated and prosecuted. Additionally, dynamic and static perspectives should be considered. The dynamic perspective refers to interactions between the ICC prosecutor and the PTC in terms of the subsequent phases of preparatory proceedings and the prosecutor’s position as a party to the trial. The structure of the proceedings based on stages influences the prosecutorial position and the scope of competencies. The latter static perspective focuses on the Office of the Prosecutor, which is headed by the prosecutor and is viewed as a body of the ICC.

From a static perspective, the office of the ICC prosecutor can be described as a separate organ of the court, playing the role of the institutionalised party before the TC. As Article 42(1) RS states,

*The Office of the Prosecutor shall act independently as a separate organ of the Court. It shall be responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, examining them and conducting investigations and prosecutions before the Court. A member of the Office shall not seek or act on instructions from any external source.*¹⁴

12 Janusz-Pohl, 2023.

13 Schabas, 2008; Brubacher, 2004; Ambos, and Bock 2012; Greenawalt, 2005; Jallow, 2005.

14 Turone, 2002.

3. Prosecutorial Activities – Keynotes

To elaborate the ICC prosecutor's activity formula, some general remarks on the typology of procedural activities at his disposal must be made. Thus, we may distinguish, according to the criterion of legal force, between prosecutorial autonomous actions and actions that shall be authorised by the PTC. In addition, due to the criterion of the mode of initiation, action upon request and action *ex officio* should be considered.¹⁵ Another important typology separates actions based on obligation that is denominated by the expression "shall" (i.e. when the prosecutor is obligated to act) and actions that remain within the scope of prosecutorial power. However, their performances remain optional (discretionary). The latter is expressed in the text of the Statute and other relevant legal content by the expression "may".

In the framework of the discussion in this study, an essential example of the prosecutor's mandatory activity is related to the principle of material truth and objectivity. Subsequently, under Article 54(1)(a) RS,

The Prosecutor shall, to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally

(objectivity; all investigative activities should be directed towards the identification of evidence that can eventually be presented in open court).¹⁶

As a side note, it should be added that the principle of objectivity may not always be easy to reconcile with the more adversarial than inquisitorial nature of the proceedings at hand. As mentioned at the outset, a certain tension exists between the prosecutor's role as a party and as a justice officer. An example of this tension is in the case of Mbarushimana, when the prosecution was reprimanded by PTC II, which found the confrontational questioning methods used by some investigators to be inappropriate given their duty of objectivity and held that such techniques might significantly weaken the probative value of evidence so obtained.¹⁷ Additionally, in the Lubanga case, the Appeals Chamber clarified that the obligation 'to establish the truth' is not limited to the period prior to the confirmation of charges, and the prosecutor as a party before the ICC during the trial stage is also covered by this obligation.¹⁸ The jurisprudence of the ICC is not consistent in this respect, as a different stance was adopted in Kenyatta, Trial Chamber V, which interpreted the prosecutorial duties to 'establish the truth' and to 'extend the investigation to cover all

15 See: Janusz-Pohl, 2017.

16 Prosecutor v. Lubanga Dyilo, ICC A. Ch., ICC-01/04-01/06-1486 (OA 13), 21 October 2008, para. 41.

17 Prosecutor v. Mbarushimana, ICC PT. Ch. II, Decision on the Confirmation of Charges, ICC-01/04-01/10-465-Red, 16 December 2011, para. 51.

18 Prosecutor v. Lubanga, ICC A. Ch., ICC-01/04-01/06-568 (OA 3), 13 October 2006, para. 52.

facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally' under Article 54(1)(a) as imposing an obligation to properly investigate the case against the accused prior to the confirmation of charges.

Regarding the scope of prosecutorial obligation, Article 54(1)(b) RS, states,

The ICC prosecutor is obliged to take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, respect the interests and personal circumstances of victims and witnesses, including age, gender as defined in Article 7, paragraph 3, and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children.

Article 54(1)(c) states, 'Fully respect the rights of persons arising under this Statute'.¹⁹

In contrast, regarding prosecutorial activities of a facultative nature, namely addressing the scope of prosecutorial competencies, we must refer to Article 54(3) RS, based on this provision:

The Prosecutor may (a) Collect and examine evidence; (b) Request the presence of and question persons being investigated, victims and witnesses; (c) Seek the cooperation of any State or intergovernmental organisation or arrangement in accordance with its respective competence and/or mandate; (d) Enter into such arrangements or agreements, not inconsistent with this Statute, as may be necessary to facilitate the cooperation of a State, intergovernmental organisation or person; (e) Agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely to generate new evidence, unless the provider of the information consents; and (f) Take necessary measures, or request that necessary measures be taken, to ensure the confidentiality of information, the protection of any person or the preservation of evidence.

4. Analysis of Selected Activities of the ICC Prosecutor from the Dynamic Perspective

Nonetheless, according to the theses adopted in this study, the challenges to the effectiveness of the ICC prosecutor's activities are in the proceedings' structural

19 Cf. Prosecutor v. Lubanga, ICC A. Ch., ICC-01/04-01/06-1486 (OA 13), 21 October 2008, paras. 42-43.

features, namely fluctuability and gradual opportunism. Selected spheres of activity of the ICC prosecutor exemplify both these phenomena. Consequently, we trace the activities relating to the initiation of the proceedings, namely preliminary examination, the proper pre-trial proceedings, and the activity relating to the interim proceedings and, more narrowly, associated with the performance of the accusation function before the TC.

As stated, prosecutorial activities at the pre-trial stage remain in constant balance with the activities of the PTC. The examples of interactions between the prosecutor and the PTC refer predominantly to a) authorisation of the PTC for the commencement of investigation *proprio motu*; b) the Court's control over the discontinuation of investigation; c) evidentiary actions of non-repeatable (of unique opportunity) character or in favour of the defendant;²⁰ d) decision on the admissibility of investigation; e) decision on an arrest warrant or summons to appear.

4.1. Preliminary examination

According to the gradual opportunism thesis, the prosecutor's discretion is the most significant within the framework of a preliminary examination. Meanwhile, let us recall that the initiation of proceedings shall occur under three triggering mechanisms based on Articles 13, 14, and 15 of the RS. One must distinguish between initiation upon request (as a result of referrals of situations to be investigated either by the States or the UN Security Council) and *proprio motu* initiation (by virtue of a decision made by the ICC prosecutor).²¹ Nevertheless, this seemingly broad discretion is tempered by the fact that investigations *proprio motu* can only be opened with a previous PTC authorisation (Article 15). In this respect, according

20 Referring just to one example based on Article 56(1)(a) RS,

Where the Prosecutor considers an investigation to present a unique opportunity to take testimony or a statement from a witness or to examine, collect or test evidence, which may not be available subsequently for the purposes of a trial, the Prosecutor shall so inform the PTC. (3)(a) Where the Prosecutor has not sought measures pursuant to this Article but the PTC considers that such measures are required to preserve evidence that it deems would be essential for the defence at trial, it shall consult with the Prosecutor as to whether there is good reason for the Prosecutor's failure to request the measures. If, upon consultation, the Pre-Trial Chamber concludes that the Prosecutor's failure to request such measures is unjustified, the PTC may take such measures on its own initiative.

It must be mentioned that the PTC may even preserve evidence in favour of the defence (see: Kony et al., Decision on Prosecutor's Applications for Leave to Appeal Dated 15th Day of March 2006 and to Suspend or Stay Consideration of Leave to Appeal Dated the 11th Day of May 2006, ICC-02/04-01/05-90, 10 July 2006, para. 35. Moreover, this is a measure that goes beyond "[taking] measures to preserve evidence").

21 In this study, the procedure *proprio motu* is not discussed in depth, as it has raised controversy since the draft project of the RS was presented. However, having in mind that the prosecution of atrocity crimes takes place in a global landscape, understandably, the drafters sought to weaken the position of the prosecutor of the ICC to strengthen the presumption of objectivity of the criminal prosecution.

to the Kenya authorisation decision, it appears that the prosecutor may only seek authorisation to investigate crimes that have already been committed or are ongoing at the time of the request.²² Such a stance seems to be premised on PTC II's fear of losing its supervisory power if open-ended investigations are authorised, and it has spurred criticism because it artificially decreases the prosecutor's ability to investigate complex and evolving crisis situations. However, when authorising investigations in Côte d'Ivoire, a different PTC has adopted the opposite stance by affirming that investigations of any crime subsequent to the prosecutor's request would still be covered by the authorisation as long as it is part of the same ongoing situation.²³

In the case of referrals, it must be emphasised that the ICC prosecutor has discretionary power to determine the territory where the preliminary examination will be conducted. PTC I clarifies that "situations" are

generally defined in terms of temporal, territorial and in some cases personal parameters and refer basically to the set of circumstances subject to investigation and prosecution. Most situations have so far been delimited with reference to a particular region or country".²⁴

It must be emphasised, though, that PTC I explained that an examination could be initiated as long as it remains within the boundaries of the situation being the object of the referral. This means that the prosecutor can investigate not only crimes that have already been committed or are ongoing at the time of the referral but also subsequent crimes 'in so far as they are sufficiently linked to the situation of crisis

22 Cf. Situation in the Republic of Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC PT. Ch. II, ICC-01/09-19-Corr, 31 March 2010, para. 206.

23 Cf. Situation in the Republic of Côte d'Ivoire, Corrigendum to 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire', ICC PT. Ch. III, ICC-02/11-14-Corr, 15 November 2011, paras. 178-179.

24 See: Northern Uganda or the Central African Republic – Situation in the Democratic Republic of the Congo, Decision on the Applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC PT. Ch. I, ICC-01/04-101-tEN-Corr, 17 January 2006, para. 65. See also Prosecutor v. Thomas Lubanga Dyilo, Decision Concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, ICC PT. Ch. I, ICC-01/04-01/06-8-Corr, 24 February 2006, para. 21; Prosecutor v. Germain Katanga, Decision on the Evidence and Information Provided by the Prosecution for the Issuance of a Warrant of Arrest for Germain Katanga, ICC PT. Ch. I, ICC-01/04-01/07-4, 5 November 2007, para. 9; Prosecutor v. Jean-Pierre Bemba Gombo, Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, ICC PT. Ch. III, ICC-01/05-01/08-14-tENG, 10 June 2008, para. 16. Additionally, it should be noted that the Comoros referral is the first not to define the situation geographically, but 'with respect to the 31 May 2010 Israeli raid on the Humanitarian Aid Flotilla bound for Gaza strip', and the first one to invoke a vessel's flag as a precondition for the exercise of jurisdiction [Referral under Articles 14 and 12(2)(a) of the Rome Statute arising from the 31 May 2010 Gaza Freedom Flotilla situation, 14 May 2013. Available at <https://www.icc-cpi.int/iccdocs/otp/Referral-from-Comoros.pdf>].

referred to the Court’.²⁵ At the same time, at the preliminary examination, the prosecutor ‘cannot deploy all these investigative powers’²⁶ and must rely on voluntary cooperation and gather information through open sources to the extent available. Thus, the efficiency of information gathering is directly proportional to the efficiency of prosecution, namely related to the issuing decision to either initiate or refuse an investigation. As a truism, it can be said that the ICC struggles with the shortage of manpower. Additionally, distance hinders investigators from collecting relevant information; therefore, any solution that has the potential to increase efficiency in this activity is to be welcomed. A new approach that can potentially increase the speed and reduce the cost of information gathering as part of this preliminary phase is the OTPLink digital platform,²⁷ which allows the online submission of evidence. Victims, witnesses, and other actors involved can submit evidence such as videos, written statements, and documents. It should be mentioned, though, that this platform is regarded as a tool for reporting under Article 15 of the ICC Statute. OTPLink is an integral part of the preliminary examination procedure, in which the prosecutor collects information, public reports, statements, and testimonies of victims and witnesses.

The prosecutor’s discretion to initiate pre-trial proceedings also relates to the temporal aspect of conducting a preliminary examination. It must be stressed that the ICC Statute does not specify a timeframe for preliminary examinations, nor does it provide any real mechanism forcing the prosecutor to submit a request to open an investigation. Hence, Article 19(4) of OTP Regulations²⁸ states that the evaluation shall continue for as long as the situation is investigated. Undoubtedly, the decision of whether a “reasonable basis” is reached marks the line between preliminary examination and proper investigation. However, the question remains, ‘What happens if the prosecutor does not officially announce such a decision?’ and whether the PTC controls the prosecutor’s decision to initiate an investigation.

This matter has led to a controversy in the Central African Republic when the prosecutor provided no information on the situation under scrutiny for over two

25 See: Prosecutor v. Callixte Mbarushimana, Decision on the Prosecutor’s Application for a Warrant of Arrest against Callixte Mbarushimana, ICC PT. Ch. I, ICC-01/04-01/10-1, 11 October 2010, para. 6; Prosecutor v. Callixte Mbarushimana, Decision on the Defence Challenge to the Jurisdiction of the Court, ICC PT. Ch. I, ICC-01/04-01/10-451, 26 October 2011, paras. 26-27.

26 See: Situation in the Republic of Côte d’Ivoire, ICC PT. Ch. III, Judge Fernández de Gurmendi’s Separate and Partially Dissenting Opinion to the Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire, ICC-02/11-15, 3 October 2011, para. 29.

27 OTPLink (icc-cpi.int). At this website, one can read that under the RS, the ICC, the Office of the Prosecutor (OTP) may analyse information on alleged crimes within the jurisdiction of the ICC submitted to it from any source. This can occur during preliminary examination as well as in the context of situations under investigation. The form on OPTLink allows for the transfer of communications to OTP either anonymously or named.

28 OTP Regulations, Regulations of the Office of the Prosecutor ICC-BD/05-01-09, RegulationsOTPEng.pdf (icc-cpi.int)

years. In this regard, the PTC emphasised that a preliminary examination must be completed within a “reasonable time”, regardless of its complexity.²⁹ In the given case, the prosecutor provided information on the status of the preliminary examination to the PTC but pointed out that this information was delivered voluntarily, as the PTC has no supervisory function at this early stage, and that the decision to seek the opening of investigations lies within the discretion of the prosecution alone.³⁰ As observed, this disagreement was neither explicitly settled by jurisprudence nor by an amendment to the Rules of Procedure and Evidence. As many authors claim, the status and length of preliminary examinations could be (partly) resolved by a new rule regulating the timeframe of preliminary examination.³¹ This *de lege ferenda* postulate seems rational. The issue of the length of preliminary examination has been discussed for a long time in the literature.³² Official data show that in 2002–2014–more than 10,000 and 2014–2022– almost 11,000 communications on situations, respectively, were submitted, and only a dozen cases were opened.³³ Undoubtedly, it should be admitted that this selectivity has so far led to instituting prosecutions mainly against citizens of states that are weak actors in the international arena or that do not enjoy the support of powerful nations.

4.2. *Investigation in rem and ad personam*

Although a prosecutorial decision on the commencement of investigation is discretionary,³⁴ it shall be based on three thresholds: a) the jurisdictional threshold combined with the probability threshold; b) the admissibility and complementarity threshold; and c) the gravity threshold. Consequently, when deciding whether to initiate an investigation, the prosecutor shall consider whether: a) the gathered information provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed; b) the case is or would be admissible under Article 17, and the complementarity criteria to determine whether the case at hand has been or is being genuinely investigated or prosecuted by a State’s national

29 Situation in the Central African Republic, ICC PT. Ch. III, Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic, ICC-01/05-6, 30 November 2006, p. 4.

30 Situation in the Central African Republic, ICC PT. Ch. III, Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic, ICC-01/05-6, 30 November 2006.

31 Stegmiller, 2011.

32 Ibidem.

33 Available at <https://www.icc-cpi.int/>

34 The prosecutor’s discretion on the commencement of the investigation is being questioned in the Comoros case, which is also an issue regarding the competence of the prosecutor and the PTC. After the prosecutor decided not to proceed with an investigation, the PTC I “requested” the prosecutor to reconsider her decision and “shall do so as soon as possible”. See: Decision on the Request of the Union of the Comoros to Review the Prosecutor’s Decision Not to Initiate an Investigation, ICC-01/13-34 16-07-2015 and the Partly Dissenting Opinion of Judge Péter Kovács.

judicial system;³⁵ c) taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice. To determine whether a case is sufficiently grave to warrant the Court's intervention, two features must be considered: first, 'the conduct which is the subject of a case must be either systematic (pattern of incidents) or large-scale'. This permits the exclusion of isolated instances of criminal activity. Second, the assessment of gravity must give due consideration 'to the social alarm such conduct may have caused in the international community'.³⁶

Referring to the thesis on structural fluctuability, an investigation is divided into two phases: *in rem* (investigation into a situation) and *in personam* (investigation against a certain person); however, the moment of transition from *in rem* to *in personam* proceedings is unclear. Consequently, during the first phase, the prosecutor analyses the entire factual situation and allegation regarding the prohibited act, and during the second phase, refers to a specific person and specific charges, which are presented in the charging document. In addition, whereas a "situation", which justifies the initiation of the proceedings, includes a range of behaviours restricted to time, venue, and potential perpetrators, a "case" refers to the specific event constituting one of the crimes falling within the Court's jurisdiction.³⁷ The notion of a "case" is used predominantly to denote one or more defendants and one or more charges stemming from one or more related incidents. The key question to be addressed is when the specific defendant is selected; precisely, when a case is selected within a situation.³⁸ Undoubtedly, no specific provision in the Statute would suggest when cases are separated from a situation.

While it is convincing that the moment of transit from the *in rem* to the *in personam* phase relates to the issuance by the PTC of an arrest warrant or summons to appear (Article 58 RS), it is not clear when the case is separated from the situation under investigation. Regarding the first issue, Article 58(1) RS states,

At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that: (a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the

35 The Appeals Chamber has defined this situation, where a State having jurisdiction is not investigating or prosecuting or has not done so, as a case of "inaction". See: Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, (Case No. ICC-01/04-01/07-1497 OA 8), ICC Appeals Chamber, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, 25 September 2009, para. 2.

36 Cf. Prosecutor v. Thomas Lubanga, (Case No. ICC-01/04-01/06), ICC Pre-Trial Chamber I, Decision Concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, 24 February 2006, Annex 1, para. 46.

37 Stegmiller, 2011.

38 Kuczyńska, 2014.

*Court, and (b) The arrest of the person appears necessary: (i) To ensure the person's appearance at trial; (ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings; or (iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.*³⁹

However, according to Article 58(3) RS,

The warrant of arrest shall contain (a) The name of the person and any other relevant identifying information; (b) A specific reference to the crimes within the jurisdiction of the Court for which the person's arrest is sought; and (c) A concise statement of the facts which are alleged to constitute those crimes.

Regarding the second issue, and strictly when the separation of the case from the situation occurs, the interpretation of Article 58(2) RS regarding the content of the prosecutor's application for issuing an arrest warrant is crucial. According to this provision:

The application of the Prosecutor shall contain (a) The name of the person and any other relevant identifying information; (b) A specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed; (c) A concise statement of the facts which are alleged to constitute those crimes; (d) A summary of the evidence and any other information which establish reasonable grounds to believe that the person committed those crimes; and (e) The reason why the Prosecutor believes that the arrest of the person is necessary.

From the quoted content, it can be concluded that the prosecutor's request, in accordance with his discretionary power, indicates specific reference to the crimes within the jurisdiction of the ICC that the specific person is alleged to have committed. This means that the demarcation of the subject boundaries of the case, although not yet confirmed by the PTC, occurs at the time of the prosecutor's application. This interpretation is supported by the wording of Article 58(6) RS:

The Prosecutor may request the Pre-Trial Chamber to amend the warrant of arrest by modifying or adding to the crimes specified therein. The Pre-Trial

39 For example, in the situation in Uganda, the PTC stated 'that attacks by the LRA are still occurring and that there is therefore a likelihood that failure to arrest [...] will result in the continuation of crimes of the kind described in the Prosecutor's application'. Prosecutor v. Kony, Warrant of Arrest for Joseph Kony issued on 8 July 2005 as amended on 27 September 2005, para. 45; Prosecutor v. Otti, Warrant of Arrest for Vincent Otti, 8 July 2005, para. 45; Prosecutor v. Lukwiya, Warrant of Arrest for Raska Lukwiya, 8 July 2005, para. 33. Warrant of Arrest for Okot Odhiambo, 8 July 2005; Prosecutor v. Ongwen, Warrant of Arrest for Dominic Ongwen, 8 July 2005, para. 33.

Chamber shall so amend the warrant if it is satisfied that there are reasonable grounds to believe that the person committed the modified or additional crimes.

Indeed, this provision expressly indicates that the subject matter boundaries of the case may be amended as appropriate.

4.3. Confirmation of the charges before trial

Holding a confirmation hearing before the trial's opening is a unique feature of this type of procedure and, at the same time, a core moment of the interaction between the prosecutor and the PTC. No other international criminal tribunal contemplates this proceeding. The trial eventually follows the confirmed indictment after the remaining pre-trial proceedings have been completed. During this phase, as is well known, the right to defence is preserved as the person concerned may challenge the charges during the confirmation hearing and, if successful, prevent the opening of a trial against him or her. One could say that Article 61 RS marks the boundaries between the pre-trial and trial stages before the Court.

Based on case law, we must add that the confirmation hearing is not a "trial before the trial" or a "mini-trial" but a procedure designed to protect the suspect against unfounded accusations and to ensure judicial economy.⁴⁰ The balance of prosecutorial discretion and controlling power of the PTC is ruled by Article 61(4) RS:

Before the hearing, the Prosecutor may continue the investigation and amend or withdraw any charges. The person shall be given reasonable notice before hearing any amendment to or withdrawal of charges. In case of a withdrawal of charges, the Prosecutor shall notify the PTC of the reasons for the withdrawal.

However, Article 61(4) RS clarifies that the provision of the document containing the charges alone does not limit the prosecutor's flexibility concerning the charges brought. Before the confirmation hearing, the prosecutor may continue the investigation and amend or withdraw charges without the permission of the PTC.⁴¹ Meanwhile, Article 61(7) states, 'The PTC shall, based on the hearing, determine whether

40 Prosecutor v. Lubanga, ICC PT. Ch. I, 29 January 2007, para. 37; Prosecutor v. Katanga and Ngudjolo, ICC PT. Ch. I, 21 April 2008, paras. 5-6; Prosecutor v. Katanga and Ngudjolo, ICC PT. Ch. I, 30 September 2008, paras. 63-64; Prosecutor v. Bemba, ICC PT. Ch. II, 15 June 2009, para. 28; Prosecutor v. Abu Garda, ICC PT. Ch. I, 8 February 2010, para. 39; Prosecutor v. Banda and Jerbo, ICC PT. Ch. I, 8 March 2011, para. 31; Prosecutor v. Muthaura et al., Decision on the Schedule for the Confirmation of Charges Hearing, 13 September 2011, para. 8; Prosecutor v. Mbarushimana, ICC PT. Ch. I, 16 December 2011, para. 41; Prosecutor v. Ruto et al., ICC PT. Ch. II, 23 January 2012, para. 40; Prosecutor v. Kenyatta et al., ICC PT. Ch. II, 23 January 2012, para. 52.

41 Prosecutor v. Lubanga, ICC A. Ch., 13 October 2006, para. 53; Prosecutor v. Mbarushimana, ICC PT. Ch. I, 16 December 2011, para. 88.

there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged'. *Mutatis mutandi*, the PTC is not a finder of truth in relation to the guilt or innocence of the person against whom a warrant of arrest or a summons to appear has been issued.⁴² However, the PTC is required to evaluate the evidence to determine the sufficiency of the evidence in order to meet this evidentiary threshold that refers to 'substantial grounds to believe (...)'. The prosecution must offer 'concrete and tangible proof demonstrating a clear line of reasoning underpinning its specific allegations'.⁴³ Unless a party provides information that can reasonably cast doubt on the authenticity of items presented by the opposing party, such items must be considered authentic in the context of the confirmation hearing (presumption of authenticity).⁴⁴

At the outset, we emphasised that the crucial area of criticism in terms of the prosecution model before the ICC lies within the scope of the accusatorial principle. Based on Article 61(9) RS, which refers to the amendment of the charges after confirmation, states:

After the charges are confirmed and before the trial has begun, the Prosecutor may, with the permission of the PTC and after notice to the accused, amend the charges. If the Prosecutor seeks to add additional charges or to substitute more serious charges, a hearing under this Article to confirm those charges must be held.

Consequently, the binding character of charges for the TC has two implications. First, the TC has no authority to ignore, strike down, or declare null and void the charges as confirmed by the PTC. Second, although the confirmation of charges could be seen as a moment of validation of indictment and, simultaneously, the moment of pendency, the latter remains conditional as the confirmation procedure shall be repeated in case of amendments to the charges by the prosecutor under the conditions stated in Article 69(9) RS.

42 Prosecutor v. Lubanga, ICC PT. Ch. I, 15 May 2006, Annex I, para. 55.

43 Prosecutor v. Lubanga, ICC PT. Ch. I, Decision on the Confirmation of Charges, 29 January 2007, para. 39; Prosecutor v. Katanga and Ngudjolo, ICC PT. Ch. I, Decision on the Confirmation of Charges, 30 September 2008, para. 65; Prosecutor v. Bemba, ICC PT. Ch. II, 15 June 2009, para. 29; Prosecutor v. Abu Garda, ICC PT. Ch. I, 8 February 2010, para. 37; Prosecutor v. Mbarushimana, ICC PT. Ch. I, 16 December 2011, para. 40; Prosecutor v. Ruto et al., ICC PT. Ch. II, 23 January 2012, para. 40; Prosecutor v. Kenyatta et al., ICC PT. Ch. II, 23 January 2012, para. 52; Prosecutor v. L. Gbagbo, ICC PT. Ch. I, 3 June 2013, para. 17; Prosecutor v. Ntaganda, ICC PT. Ch. II, 9 June 2014, para. 9; Prosecutor v. L. Gbagbo, ICC PT. Ch. I, 12 June 2014, para. 19; Prosecutor v. Bemba et al., ICC PT. Ch. II, 11 November 2014, para. 25; Prosecutor v. Blé Goudé, ICC T. Ch. I, 11 December 2014, para. 12.

44 Prosecutor v. Lubanga, Decision on the Confirmation of Charges, ICC PT. Ch. I, 29 January 2007, para. 97; Prosecutor v. Mbarushimana, ICC PT. Ch. I, 16 December 2011, para. 59; Prosecutor v. Bemba et al., ICC PT. Ch. II, 11 November 2014, para. 14.

It should be emphasised that the essence of the accusatory principle relates to the fact that, without the consent of the authorised prosecutor, the adjudicating body in the case may not initiate proceedings (initiating function). At the same time, the complaint that initiates proceedings before the court of first instance absolutely determines the programme of these proceedings (programmatic function). This means that the court procedures may concern only the defendants and the prohibited acts specified in the indictment. The judicial authority may not expand the indictment's substantive and subjective limits, but may and even must update the legal qualification. It also has a duty to recognise a complaint brought successfully (function of procedural duty). Based on the content of the complaint, the complaint is also considered to have a balancing function (in comparison with the pre-trial proceedings) and an informational function (complementary and subsidiary to the programmatic function). Simultaneously, controversy may arise regarding the regulation of the withdrawal of the complaint. Article 61(9) RS states that withdrawal of the charges after confirmation is possible even after the commencement of the trial; the 'Prosecutor may withdraw the charges with the permission of the TC'. After the opening of the trial, the withdrawal of the complaint by the prosecutor, but with the consent of the TC, is an inquisitorial feature of the analysed model of proceedings. Thus, even though the prosecutor is a party and is obliged to have the dispute handled before the TC, his power to dispose of the complaint is not granted. This means that in a situation of conflict referring to the prosecutor's decision to withdraw the charges, on the one hand, and the lack of consent of the TC for the withdrawal, on the other hand, the power of the TC prevails, and consequently, hypothetically, the prosecutor shall be forced to maintain charges.

Another problematic aspect of the accusatory principle relates to its temporal scope, as no definition is provided in the Statute or the Rules of Procedure and Evidence regarding when the trial is considered to have begun. As stated at the outset, this shall be regarded as an example of the fluctuability (referring to flexible frames of procedure) of the model of the proceedings at hand. As scholars rightly observe, the drafters of the Statute borrow from different legal cultures and systems and intend the "commencement of the trial" to mean both the start of the proceedings before the TC ("trial proceedings") and the commencement of hearings on the merits ("trial" or "hearing").⁴⁵ Therefore, between the confirmation of charges phase and the commencement of trial, there is a unique transitional phase in which, in principle, the case becomes pending before the court. However, there is still room for some significant modifications regarding the charge lodged, including its withdrawal by the prosecutor. Inferring *a contrario*, withdrawal before the beginning of the trial does not require TC approval.

45 Prosecutor v. Katanga and Ngudjolo, ICC T. Ch. II, 16 June 2009, para. 41.

4.4. Scope of prosecutorial activities in the trial

Within the framework of the assumptions of this study, the dualistic position of the ICC prosecutor, being an organ of pre-trial proceedings and an officer of justice on the one hand, and a procedural opponent of the accused in the judicial process on the other, is highlighted. In addition, we have indicated that the prosecutor's discretion decreases with the advancement of the proceedings and, similarly, the opportunism of the proceedings decreases. This finding corresponds with the formula of the accusatorial principle described above, particularly the mechanism of withdrawal of charges.

Thus, focusing on the most critical elements of the prosecutor's position in judicial proceedings features that are considered challenges based on the analysed model, one should refer to the issue of the distribution of the burden of proof, prosecutorial discretion regarding the subject matter of the case and additional prosecutorial actions at the request of the TC. As Article 66(2) RS states, the onus is on the prosecutor to prove the guilt of the accused; moreover, the evidentiary threshold for conviction is settled by the expression that the guilt of the accused must be proved beyond a reasonable doubt. Therefore, the prosecutor bears the burden of proving the veracity of the accusation's allegations. He must carry out the evidentiary initiative. Moreover, the realisation of the onus probandi is being subordinated to the principle of the defence. Article 67(2) states,

In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which they believe shows or tends to show the innocence of the accused or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.

It follows from the above that, regardless of the performance of the accusatory function, the prosecutor of the ICC is obliged by the principle of objectivity and, therefore, acts more even in court proceedings as an officer of justice than as a party.

Moreover, although the prosecutor acts as a party to the jurisdictional proceedings and is not under the court's control, he may carry out the court's instructions in exceptional circumstances. Indeed, let us recall that at the judicial stage, the TC, not the prosecutor, is the principal guardian of the principle of material truth. For example, Article 65(4) RS states,

Where the Trial Chamber is of the opinion that a complete presentation of the facts of the case is required in the interests of justice, in particular the interests of the victims, the Trial Chamber may: (a) Request the Prosecutor to present additional evidence, including the testimony of witnesses [...].

With the background of the analysed model, which, as has been highlighted many times, is a certain compilation of the features of the prosecution model in the continental proceedings and also in the common law regimes, we have already emphasised that once the pendency of the case before the court arises and the trial begins, the prosecutor relinquishes the right to dispose of the case. A manifestation of this rule is also the formation of procedural consensualism and, more specifically, procedural bargains. Consequently, Article 65(5) RS states, ‘Any discussions between the Prosecutor and the defence regarding modification of the charges, the admission of guilt or the penalty to be imposed shall not be binding on the Court’. Once the pendency of the case before the court is created, the subject matter of the lawsuit remains entirely at the court’s disposal.

5. Final Remarks

Based on the assumption that the two elements, namely structural fluctuability and gradual opportunism, constitute challenges relevant to the effectiveness of the performance of prosecutorial functions. It should be mentioned that it was also assumed that effectiveness is not only a praxeological category but also an axiological one.

Thus, in the context of the realisation of prosecutorial functions, it also includes the values derived from the principle of an appropriate criminal response, according to which only the true perpetrator of a crime is allowed to be held criminally responsible. This requires taking into account, on the one hand, the guarantees arising from the right to defence, and, on the other hand, the demands of material truth. Within the framework of the issues analysed, reference was made to the role of the ICC prosecutor in dynamic terms. Nevertheless, one should advocate for the proposal of those scholars who postulate that the preliminary examination should be covered by a temporal rule, albeit with optional restrictions. In the context of the prosecutor’s powers during investigations. Although prosecutorial discretion is strongly limited by the PTC, it still includes competence to isolate “the case” from “the situation under investigation”. It should also be noted that the very moment of the transformation of proceedings *in rem* to the *ad personam* phase could be nontransparent from the point of view of representatives of the international community (particularly non-professionals), as the RS does not employ the notion of “a suspect” but only operates based on notions such as “a person against whom the arrest warrant has been issued” or “a person against whom the prosecutor requests the confirmation of charges”. Thus, it can be said that (based on the RS) the so-called “material option” of the defendant in pre-trial proceedings is assumed. It would seem reasonable to reconsider introducing a formal definition of “the suspect”, although, undoubtedly, such a demand was initially rejected by the drafters of the Statute. The sequential analysis was critical for

shaping the accusatory principle, particularly within the context of the institutions of confirmation of charges or the withdrawal of charges (which currently depends on the decision of the TC). The general postulate in this regard is to strengthen the accusatory principle and thus claim greater prosecutorial discretion. Naturally, the author is aware that the outlined reflections have little chance of turning into actual *de lege ferenda* postulates. However, the 25th anniversary of the ICC seems to be a suitable moment to put forward a tentative postulate to start a discussion on the optimisation of the adopted model.

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CHAPTER 6

ICC AT 25: THE OUTER RIMS OF JURISDICTION



TAMÁS ÁDÁNY

Abstract

Since its establishment in 2002, the International Criminal Court (ICC) has clarified key jurisdictional issues arising from the Rome Statute and the UN Charter, emphasizing personal, territorial, and temporal jurisdiction. After twenty-five years, the ICC faces criticism for limited effectiveness and accusations of bias, yet it endures and has made significant progress. Its jurisprudence reflects a cautious adherence to international law, enhancing legal certainty despite challenges in a fragmented system. However, state withdrawals and lack of cooperation threaten investigations and prosecutions, complicating the Court's retributive function. Nonetheless, the ICC's patience and the political stigma of indictments serve preventive goals by deterring future crimes. Despite ongoing difficulties, the Court's experience offers cautious optimism for international criminal justice and accountability.

Keywords: International Criminal Court (ICC), jurisdiction, Rome Statute, international criminal justice, legal effectiveness

Introduction

The International Criminal Court (ICC) has made numerous decisions regarding its competence in the approximately two dozen situations it has faced since its establishment in 2002. This case law forms a sufficient basis to clarify several issues left open in the basic documents – deliberately or otherwise – during the Rome Conference and the preceding preparatory work.

In any judicial proceeding, the question of jurisdiction is pivotal. Without such law-based authority, no judge can claim to have the competence to sit in a case's trial; therefore, jurisdiction must be observed throughout the procedure. The ICC is also an international court, where this authority is not simply a quasi-automatic derivative of the sovereign power of a competent State; however, it must be based on a binding international treaty. The Rome Statute and the United Nations Charter are such treaties for the ICC, if the United Nations Security Council (UNSC) refers a matter to the Court. In this case, jurisdiction is based on Articles 25 and 103 of the Charter, providing the binding force of certain UNSC resolutions, overcoming the relative scope of the Rome Statute expressed by the *pacta tertiis* rule of the law of treaties.¹

This is, however, a rather special scenario. The ordinary way to create, observe, and exercise jurisdiction for the ICC is based on the Rome Statute. A brief summary of these rules would be that jurisdiction must exist in three aspects: there is a need for 1) a personal or territorial jurisdiction; 2) temporal jurisdiction; and 3) subject matter jurisdiction. As the last one would demand focusing more on the substantive issues than the procedural ones, only the first two are discussed in this chapter.

1. Territorial jurisdiction

After many necessary compromises within the PrepCom and at the Rome Conference, many terminological uncertainties remained in the text of the Statute.² Issues regarding jurisdiction demand that a position be taken on problems that traditionally fall within the scope of public international law, such as the rules of the law of treaties or those on statehood. The ICC observed various situations emerging from disputed territories: where only one contestant State was a party to the Rome Statute; where elements of crimes occurred in more than one country; and where not all concerned States were States Parties. Somewhat overlapping with temporal jurisdiction, the ICC obtained jurisdiction in situations where a State Party's territory

1 Iyi, 2018, p. 35.

2 For some examples, see Sadat and Carden, 2017; Kirsch and Holmes, 1998; Benedetti and Washburn, 1999.

seceded or was *prima facie* transferred to a non-State Party. Even the very question of statehood and the competence to decide on that question emerged and was eventually answered by the ICC judges.

1.1. South Ossetia – *disputed territory*

The first question to be examined relates to disputed territories between States, where one of the contestants is not a State Party to the Rome Statute. This scenario emerged in the case of Georgia. In 1990, South Ossetia – a territory of less than 4,000 km² – made a declaration to obtain its sovereignty while maintaining its position within the then-existing Soviet Union.³ This semi-independence was never recognised by Georgia; after a two-year-long conflict, there was an attempt to reintegrate the area to Georgia. However, from the late 1990s, there was a slow, but steady series of Russian foreign policy measures, such as issuing Russian passports (i.e. nationality to South Ossetian residents) that gradually eroded Georgia's control of the area. In 2006, without authorisation from Georgia, a referendum on independence was held in the region, which was contested by an alternative voting organised by ethnic Georgians from the region.⁴ The slow but steady Russian takeover continued up until 2008, when Georgian forces attempted to re-establish their hold over the territory. In a matter of days, the Russian military defeated Georgian troops; in the meantime, crimes within the ICC jurisdiction had been committed.⁵ On 16 April 2008, President Putin signed a decree authorising official ties and relations with Abkhazia and South Ossetia. Despite these developments, South Ossetia was not recognised by the international community, except for five UN Member States, including Russia.⁶ To date, Georgia considers its breakaway regions (together with Abkhazia) occupied territories. According to recent independent reports, today, Georgia does not have access or control over this territory.⁷

Against this background, the Office of the Prosecutor (OTP) filed a request for authorisation of an investigation.⁸ Consequently, on 27 January 2016, the ICC ruled on whether it had jurisdiction over the situation emerging from a contested territory. The relevant OTP request proposed a pragmatic approach that aimed at finding a conclusion to the *de facto* situation. The OTP described this region as the 'geographical area of today's *de facto* territory of South Ossetia corresponds with the historic boundaries of the former South Ossetian Autonomous District'.⁹ Without

3 Segate and Dovgalyuk, 2017.

4 Mchedlishvili, 2006.

5 For examples, see Jeiranashvili, 2019.

6 Medvedev, 2008.

7 Reuters 2023.

8 "Request for authorisation of an investigation pursuant to article 15" ICC-01/15-4 13 October 2015 | Office of the Prosecutor | Request.

9 Decision on the "Prosecutor's request for authorization of an investigation" ICC-01/15-12 27 January 2016 | Pre-Trial Chamber I | Decision, para. 20.

sorting out the intricacies of a territorial dispute, the OTP opened a way for the ICC to follow a pragmatic approach, respecting the boundaries of the mandate of the Rome Statute: ‘For the purposes of this Application, the Prosecution considers that South Ossetia was a part of Georgia at the time of commission of the alleged crimes and occupied by Russia at least until 10 October 2010’.¹⁰

Pre-Trial Chamber I agreed with this submission, and *in lieu* of a detailed reasoning, added that the area ‘is generally not considered an independent State and is not a Member State of the United Nations’.

Therefore, it can be observed that the ICC is unwilling to be used as a mere tool in territorial disputes, and refrains, as much as possible, from making declarations in such matters beyond what is absolutely necessary. In its decisions regarding Georgia, it gave a much higher regard to legally relevant factual findings than to official declarations.

1.2. *Palestine – disputed statehood*

The issue of Palestinian statehood has been long discussed in practice, and consequently, it is a well-documented question in international legal literature. This discussion is not reviewed here, mainly because the sheer size of such an attempt would stretch the scope of the present examination too far. In addition, the two-state solution has again become a dually heated political question in the recent tragic escalation of the conflict started by the 7 October 2023 systematic and barbaric attack of a group of predominantly Israeli civilian victims by Hamas; and the subsequent wide scale humanitarian horrors occurring during the ongoing Israeli military operation in the Gaza Strip.

From a political perspective, these recent events convey an impression of the last time the ICC examined its jurisdiction over the situation in Palestine being in a previous epoch. However, from a legal standpoint, the jurisdictional findings and the respective methodology of the 2021 decision of the Pre-Trial Chamber remain relevant. The examination leading to that decision started in 2015, focusing on alleged war crimes committed by Palestinian and Israeli forces during Operation Cast Lead. The situation was acknowledged as ‘unique and highly contested’ from the outset,¹¹ which is also marked by the unusually high number and diverse *amicus curiae* briefs. Among the many legal and factual challenges of the situation, the Pre-Trial Chamber opted for a more careful approach and relied on the relevant previous decisions of other State-driven international organs, namely the UN General Assembly¹² and the ICC’s Assembly of State Parties. Following this method, it was observed that:

¹⁰ Ibid., para. 54.

¹¹ Bensouda, 2019.

¹² The implications of these decisions have been subject to discussion even before the ICC acted on the situation. See: Holvoet and Mema, 2013; Dugard, 2013.

the General Assembly has accepted Palestine as a non-Member observer State in the United Nations, and [...] as a result, Palestine would be able to become party to any treaties that are open to 'any State' or 'all States' deposited with the Secretary-General.

The Pre-Trial Chamber lacked the authority to review – and consequently to differ from – the UNGA Resolution¹³ admitting Palestine as a non-member observer State to the UN.¹⁴

This Resolution drastically changed the practice of the United Nations Secretary-General as regards its acceptance of Palestine's terms of accession to different treaties, including the Rome Statute, as he concluded that Palestine would now be able to deposit instruments of accession and become a party to any treaties deposited with the Secretary-General that are open to 'all States' or 'any State'.¹⁵

In light of the above developments, the Assembly of State Parties allowed Palestinian accession to the Rome Statute, following the due process prescribed by the Statute itself. The Chamber thus concluded that '[it] has no jurisdiction to review that procedure and to pronounce itself on the validity of the accession of a particular State Party would be ultra vires as regards its authority under the Rome Statute'.

Basing statehood on legal declarations only would befit a Kelsenian normative mirage; however, it is not followed by contemporary practice or an academic mainstream,¹⁶ and factual examination is excluded by the fact that the ICC has no statutory competence to oversee those factors that usually help other international judicial *fori*, such as the International Court of Justice, to decide on statehood. Therefore, the Court decided to continue the procedure; however, the cautious wording of the decision avoids formulating a direct declaration on Palestinian statehood.

1.3. Bangladesh/Myanmar – multiple locations

International crimes are typically large-scale atrocities. Such human rights violations often occur in a larger geographical area, or impact a larger territory by forcing mass migration of refugees or internally displaced persons. All crimes defined in Article 5 require an examination of several elements; in some instances, the circumstances of the atrocities define the classification of the crime, and not the heinous

13 A/RES/67/19 UNGA Resolution 67/19.

14 Decision on the "Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine." ICC-01/18-143, 5 February 2021 | Pre-Trial Chamber I | Decision, para. 99.

15 Ibid., para. 98

16 Akande, 2012.

conduct itself. For instance, rape and other forms of sexual violence can be part of genocide, crimes against humanity, or a war crime.¹⁷

Due to this complexity of the crimes and the usually large geographical area where certain elements of crimes occur, it was reasonable to believe that in some cases, these elements will result in a transboundary crime, where several elements may occur in a non-State Party while others occur within the territory of a State Party of the Rome Statute. Despite this, the Statute does not provide clear guidance for such scenarios.

The crimes committed against the Rohingya minority in Myanmar resulted in their mass exodus to neighbouring Bangladesh. The latter is a State Party to the Statute, whereas the former is not.

The subject matter in this examination was the crime against humanity through deportation, where one element of the crime occurred when the perpetrator forcibly displaced, ‘without grounds permitted under international law, one or more persons to another State or location, by expulsion or other coercive acts’. The slight difference between deportation and forcible transfer lies in the target location of the forced movement. Whereas in the case of deportation, this movement is transboundary, “forcibly displaced” highlights that the act remains punishable even if it occurs within the borders of a single country.¹⁸

The usually uncontroversial territorial principle embodied in Article 12(2)(a) of the Rome Statute refers to the ‘State on the territory of which the conduct in question occurred’. When the ICC first dealt with a case where the location of various elements of the crime spread to several States, it first sought guidance from the respective practice of States regarding territorial jurisdiction. State practice on criminal jurisdiction comes as a natural model for territorial issues, as the ICC relies heavily upon the transferred powers of the States, of course, except for universal jurisdiction.¹⁹ Reiterating the old findings on the merits of the Lotus case,²⁰ Pre-Trial Chamber I ruled that

the preconditions for the exercise of the Court’s jurisdiction pursuant to article 12(2)(a) of the Statute are, as a minimum, fulfilled if at least one legal element of a crime within the jurisdiction of the Court or part of such a crime is committed on the territory of a State Party.

Pre-Trial Chamber III later followed the same approach when observing that customary ‘international law does not prevent States from asserting jurisdiction over acts that took place outside their territory on the basis of the territoriality principle’.²¹

17 For a detailed case law of the ICTY on these issues, see <https://www.icty.org/en/features/crimes-sexual-violence/landmark-cases>

18 Lee, 2003.

19 Varga, 2006.

20 Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute.” ICC-RoC46(3)-01/18-37, 6 September 2018 | Pre-Trial Chamber I | Decision, para. 66.

21 Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the

2. Temporal jurisdiction

The temporal dimension of jurisdiction was tested in the first 25 years of the ICC. The commencement date of a State's acceptance of jurisdiction is a relatively simple matter – it may be different in the case of certain crimes within the jurisdiction of the Court; however, it has not yet been contested in the courtroom.

The ICC was established by means of an international treaty, and its consent to be bound by its rules can be withdrawn, as generically regulated by the Vienna Convention on the Law of Treaties and, more importantly, by the specific rules of the Rome Statute itself.²² Burundi and the Philippines both withdrew their consent after certain procedural steps were taken by the ICC regarding their territories. This withdrawal occurred at different stages of the procedure; however, both suggest that *ex post facto* opting out from the jurisdiction of the ICC does not prevent the Court from processing the situation. Nevertheless, lack of State cooperation may render serving justice even more difficult than in ordinary cases.

2.1. *Burundi – withdrawal after the ICC took action*

Burundi is a densely populated, multi-ethnic State that has witnessed numerous atrocities during its modern post-colonial history: a 2002 UN Commission of Inquiry identified two genocides in the four decades that had passed after the restoration of independence; and a bloody civil war raged on from 1993 to 2005, although, from the turn of the millennium, many international efforts were made to reconcile the situation. Burundi ratified the Rome Statute on 21 September 2004. Still, extreme poverty remained a problem in the mostly rural country, and the reconciliation efforts failed, resulting in a 2015 unrest. Hundreds of thousands of people had to seek refuge in neighbouring countries.

An independent UN investigation was launched by the Human Rights Council in December 2015.²³ The OTP announced a preliminary examination of the situation in April 2016.²⁴ Burundi refused cooperation with the independent investigators and withdrew from the Rome Statute in October 2016. The consequences of the latter are regulated in detail by Article 127 of the Statute, which makes it clear that the withdrawal takes effect after one year,²⁵ and during that period, any and all obligations of the State under Statute are sustained. There is a somewhat cryptic closing reference in Section (2) of the Article, which sets out the consequences of such a withdrawal, stating that the withdrawal shall be without 'prejudice in any way the continued

Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar. ICC-01/19-27, 14 November 2019 | Pre-Trial Chamber III | Decision, para. 56.

22 See Rome Statute Article 127.

23 A/HRC/RES/S-24/1

24 Bensouda, 2016.

25 A later date may be specified.

consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective’.

A narrow interpretation of this text would limit continued court operations to matters that were already under consideration prior to the withdrawal, nevertheless, the nature of any judicial procedure is that a certain procedural step necessarily leads to another in a way prescribed by the relevant regulations, in the case of the ICC, mostly by the Rome Statute and the Rule of Procedure and Evidence. When withdrawal happens early on in a procedure, such a narrow interpretation would mean that the Court cannot continue its proceedings, even if it finds that it has jurisdiction over the matter. Such a narrow interpretation would be contrary to the object and purpose of the treaty because it would provide a free “get-out-of-jail” card to any powerful State leader committing international crimes, so that even the principle of effectiveness might be raised.

Therefore, it is not surprising that Pre-Trial Chamber III ruled differently when it had to decide whether to authorise the request of the OTP to investigate cases. Investigation takes place after the Court satisfies itself that it has jurisdiction over the case. The Chamber ruled,

*if authorized, an investigation into the situation in Burundi would commence prior to the date on which the withdrawal became effective. Therefore, subsequent to the entry into force of its withdrawal, Burundi’s obligation to cooperate with the Court in relation to such an investigation, if authorized, remains in effect for as long as the investigation lasts and encompasses any proceedings resulting from the investigation.*²⁶

2.2. Philippines – ICC action after withdrawal

The situation in the Philippines revolved around the government’s harsh “war on drugs” policy that was tantamount to crimes against humanity according to the submissions of the OTP. The Philippines became a State Party to the Rome Statute on 1 November 2011, long before the commencement of the contested policy. On 30 June 2016, Rodrigo Duterte was inaugurated as the president of the Philippines and promised originally to rid the country of illicit drug trafficking within six months. This turned out to be impossible, as the anti-drug campaign resulted in mass human rights violations and several extra-judicial killings. A few months later, in October 2016, Fatou Bensouda, then ICC Chief Prosecutor, issued the following statement:

26 Public Redacted Version of “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi.” ICC-01/17-X-9-US-Exp, 25 October 2017, ICC-01/17-9-Red, 9 November 2017 | Pre-Trial Chamber III | Decision pp. 14-15, para. 26.

I am deeply concerned about these alleged killings and the fact that public statements of high officials of the Republic of the Philippines seem to condone such killings and further seem to encourage State forces and civilians alike to continue targeting these individuals with lethal force.

Extra-judicial killings may fall under the jurisdiction of the International Criminal Court (“ICC” or “Court”) if they are committed as part of a widespread or systematic attack against a civilian population pursuant to a State policy to commit such an attack.

The Republic of the Philippines is a State Party to the ICC, and as such, the Court has jurisdiction over genocide, crimes against humanity, and war crimes committed on the territory or by nationals of the Philippines since 1 November 2011, the date when the Statute entered into force in the Philippines.

Let me be clear: any person in the Philippines who incites or engages in acts of mass violence including by ordering, requesting, encouraging or contributing, in any other manner, to the commission of crimes within the jurisdiction of the ICC is potentially liable to prosecution before the Court.

As the ICC examination continued, the OTP opened a preliminary examination into the situation in February 2018. A few days later, Duterte’s government deposited a written notification of withdrawal from the Statute on 17 March 2018, which took effect on 17 March 2019. However, the preliminary examination into the situation could continue based on the last sentence of Article 127(2), and on 14 June 2021, Ms. Bensouda announced that her office requested judicial authorisation to continue with an investigation.

This authorisation was granted on 15 September 2021, when Pre-Trial Chamber I authorised the Prosecutor to commence an investigation of crimes within the jurisdiction of the Court allegedly committed on the territory of the Philippines between 1 November 2011 and 16 March 2019 in the context of the so-called “war on drugs” campaign.

This authorisation followed the Prosecutor’s request to open an investigation, initially submitted on 24 May 2021 and filed in a public redacted version on 14 June 2021. The Chamber also received views on this request submitted by or on behalf of victims. In November of the same year, the Philippines submitted a motion to defer the investigation under Article 18(2) of the Statute. This tool is designed for States that are able and willing to genuinely prosecute crimes within the jurisdiction of both the ICC and the State concerned. A successful application would result in the investigation and subsequent trial of the case to return to the competence of the State, and the ICC moving to the background, observing the quality of the procedure. By 22 June 2022, the OTP considered that the conditions of such deferral had not been met, and therefore requested authorisation to resume its own investigation. On 26 January 2023, following a careful analysis of the materials provided by the

Philippines, Pre-Trial Chamber I granted the Prosecutor's request to resume investigation into the Situation of the Republic of the Philippines.

The first Pre-Trial Chamber ruling on the Philippines did not treat jurisdiction *ratione temporis* as a complex or central issue. In a short and straightforward manner, the Chamber based its findings simply – and correctly – on the long-standing customary rules of the law of treaties embodied in the 1969 Vienna Convention. Based on Article 70 thereof, the Chamber found that ‘a treaty does not affect any right, obligation or legal situation created through the execution of the treaty prior to its termination’.²⁷ As an important clarification, the judges closed their relevant findings by highlighting that the ‘exercise of such jurisdiction is not subject to any time limit’. Effectively, this statement reiterates that the lapse of time does not procedurally hinder the enforceability of the rights and obligations of a State that substantively existed at a certain time. The withdrawal is nonetheless effective in the sense that the Court has no jurisdiction – even in the same procedure – over the crimes committed after such withdrawal took effect.

The second ruling, which permitted the OTP to resume the investigation, did not change this perspective and upheld the issue as a matter of treaty law against the Philippines's argument that ICC actions were tantamount to an interference in its domestic affairs. In that regard, Pre-Trial Chamber III noted:

*The Court's jurisdiction and mandate is exercised in accordance with the provisions of the Statute, an international treaty to which the Philippines was a party at the time of the alleged crimes for which the investigation was authorised. By ratifying the Statute, the Philippines explicitly accepted the jurisdiction of the Court, within the limits mandated by the treaty, and pursuant to how the system of complementarity functions.*²⁸

2.3. Darfur, Sudan – an ostensible withdrawal

The situation in Darfur, Sudan, is different from all the situations discussed above because jurisdiction here was not triggered by a State Party referral, but by a UNSC Resolution. With the correct application of the *nemo plus iuris* principle, it seems unequivocal that no State can withdraw a consent it never expressed. It was not even Sudan, but the Defence in jurisdiction in the Ali Abd-Al-Rahman (Ali Kushayb) case that contested the continued existence of the Court's competence.²⁹

The jurisdiction of the Court in this situation is based on UNSC Resolution 1593; however, this was far from the last Security Council Resolution on Sudan. The

27 Decision on the Prosecutor's request for authorisation of an investigation pursuant to Article 15(3) of the Statute. ICC-01/21-12, 15 September 2021 | Pre-Trial Chamber I | Decision, para. 111.

28 Public Redacted Version of “Authorisation pursuant to article 18(2) of the Statute to resume the investigation.” ICC-01/21-56-Red, 26 January 2023 | Pre-Trial Chamber I | Decision, para. 26.

29 Pre-Trial Chamber II, Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman, Decision on the Defence ‘Exception d’incompétence’ (ICC-02/05-01/20-302), 17 May 2021, ICC-02/05-01/20-391, para. 33.

Defence in the Ali Kushayb case challenged the jurisdiction *inter alia* based on the argument that the subsequent UNSC Resolution 2559 overruled Resolution 1593; thus, the jurisdiction of the ICC ceased to exist. The Chamber could have found compelling arguments for the falsity of these statements. First, at a general level, Resolution 2559 reaffirms all previous resolutions, but its provisions terminate certain institutions established by previous resolutions. However, it does not contain any specific reference to the ICC procedure. Pre-Trial Chamber II followed a different approach and did not even address the above issues. Instead, the judges outrightly rejected the examination of the merits of the argument and, instead, focused on the impact of such contentions. They noted that

*the very idea that the effect of an act triggering the jurisdiction of the Court could be simply taken away by a subsequent act – and one not even relating to the same subject matter – runs counter to fundamental and critical features of the system governing the exercise of the Court’s jurisdiction, as enshrined in the Statute as a whole.*³⁰

More importantly, from the perspective of the current examination, the Chamber also observed that the

*withdrawal of a State Party from the Statute, whilst provided for under article 127 and therefore possible, has no effect on the previously established jurisdiction of the Court and takes effect only one year after the date of its receipt at the earliest; also, it has no impact either on already ongoing proceedings or on duties of cooperation with the Court in connection with investigations and proceedings having commenced prior to the date on which the withdrawal became effective, nor does it otherwise prejudice ‘the continued consideration of any matter which was already under consideration by the Court’ prior to that date.*³¹

3. Conclusion

Twenty-five years after its establishment, the “end of the beginning” is over for the ICC. It faces many criticisms regarding its effectiveness. It seems to overcome charges of being biased against African leaders; however, it is condemned to inaction in several shocking humanitarian catastrophes.³² Against all odds, the Court

³⁰ Ibid.

³¹ Ibid.

³² Geneuss and Mariniello, 2019.

still exists, and has made considerable progress, and despite all the contemporary difficulties faced by the international criminal justice and the rules-based world in general, the lessons learned from the above disputes at the fringes of the jurisdictional rules of the Rome Statute outline a picture that warrants some optimism.

The decisions cited above show that the ICC closely follows a sense of legality derived from the general public international law framework. In the contemporary fragmented system of international law, the reluctance of the judges to develop new interpretations of existing rules and institutions on territorial sovereignty, jurisdiction, or the law of treaties is unfortunate. This tendency may surely increase legal security and the overall credibility of the international criminal justice system.

Naturally, a deeper look leads the beholder to a far more pessimistic, even sinister undertone. As withdrawal from the jurisdiction of the Court is a clear sign that – at the very least – the government of that State does not wish to continue cooperating with ICC organs, one should be concerned about what can happen to cases emerging from such situations. The lack of cooperation makes it difficult, if not impossible, to continue the investigations with any hope of finding sufficient evidence to prove the guilt of an individual beyond a reasonable doubt at the trial phase.

To address this problem, a distinction should be made between the retributive and preventive functions of any criminal legal system.

From a retributive perspective, the world has yet to learn about the patience of the international criminal justice system. The lapse of time – even if measured in decades – does not hinder or terminate future criminal prosecutions. Watching the legislative developments leading to the acceptance of the text of the Statute, one would not have bet large amounts that the ICC would issue an arrest warrant against the reigning leader of a UNSC permanent Member State. The arrest warrant against Russian President Vladimir Putin may lead to further conclusions. Omar Hassan al-Bashir toured the world in the limelight, even after an arrest warrant had been issued against him. In his diplomatic visits, he also entered the Republic of South Africa once. In comparison, a few years later, even President Putin, having also become a wanted person by the ICC, opted to send only a video message to the politically significant BRICS summit.

In terms of the preventive function, the effects of proclaiming an investigation are two-fold: the perpetrators could actively seek to destroy evidence, including tampering with witnesses, which, in turn, may lead to a direct threat to the lives of those involved. Furthermore, powerful persons of interest may be in a position to effectively thwart criminal proceedings. In comparison, the stigma of an ICC arrest warrant may not be powerful, as it does not necessarily result in a global manhunt for the alleged perpetrator. However, it makes making friends and relying on old friendships more difficult for those pariah leaders and even their political systems. It separates wanted persons from other world leaders and makes it politically more costly to support them openly. The Augusto Pinochets of the future cannot be certain that after their crimes and days in power are over, they will receive only nice celebratory gifts during their peaceful retirement from their former colleagues. Noting,

finally, that so far in human history, no political system has lasted forever, and domestic politics, particularly in violent or conflict-ridden societies, may abruptly lead to rapid changes, the preventive function of the jurisdictional regime of the ICC may result in adding merit to the old wisdom of “no sleep for the wicked”.

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GENOCIDE UNDER THE STATUTE OF THE ICC: AN ATTEMPT TO ORGANISE THE INTERPRETATIVE ISSUES USING METHODS OF MODERN CRIMINAL LAW ANALYSIS



ŁUKASZ POHL

Abstract

The interpretation of the provisions of the Statute of the International Criminal Court (ICC) defining the grounds of criminal responsibility for the crime of genocide is the subject of many interpretative disputes. However, these disputes are premised on certain theoretical assumptions. These assumptions fall into one of two types: those directly reflected in the text of the Statute, and assumptions that affect interpretation because the interpreter is convinced of such a role. Therefore, the accuracy of both types of assumption can be verified. This chapter focuses on assumptions that emerge in the reconstruction of the norms of the Statute that prohibit genocide. This choice is prompted by the fact that the output of the jurisprudence and the literature appears unsatisfactory. In doing so, this chapter shows that:

- 1) For all crimes under ICC jurisdiction, the provision of the Statute containing the norms prohibiting the commission of crimes is Article 25(2).
- 2) Article 6 of the Statute—the provision that defines the term “genocide”—is the provision that makes the content of this norm adequate.
- 3) Article 25(2) contains the following sanctioned norms: first, prohibition of the killing of members of a protected group; second, prohibition of the infliction of grievous bodily or mental harm on members of a protected group; third, prohibition of the creation of living conditions for a protected

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group calculated to bring about its physical destruction in whole or in part; fourth, prohibition of the use of measures aimed at stopping births within the protected group; and fifth, prohibition of the forced transfer of children of members of the protected group to another group.

4) Article 25(3)(a) indicates that the previously distinguished sanctioned norms prohibiting genocide shall also be violated jointly with another person (this framing constructs the formula of co-perpetration).

5) The normative status of the crime of genocide committed through another person has the closest connection to the construction of indirect perpetration.

6) In case of behaviours typified in Article 25(3)(b)—namely, the commission, incitement, and inducement to commit the crime of genocide—sanctioned norms are separated from norms prohibiting particular varieties of the crime of genocide (typified in Article 6).

7) Article 25(3)(c) does not indicate either the conduct to which aiding and abetting would be relativised or the conduct that the instigator would incite.

8) The contribution to the crime of genocide appears to be a highly indeterminate form of behaviour. Consequently, it is challenging to consider “the contribution to the crime” as an appropriately defined object of criminal law regulation, underscoring the need to clarify it in the Elements of Crimes.

9) It would be better to use the construction of a “broad intention” here, including the formula of *dolus eventualis*.

10) Article 25(3)(f) specifies that an attempt is the taking of action that initiates the commission of a crime. Here, it seems apparent that a narrow approach to the attempt to commit the crime of genocide is unconvincing. Certainly, many national criminal law systems adopt a different conception, according to which an attempt is behaviour that starts earlier, namely, at the moment when the perpetrator directly aims at performing a prohibited act. This normative analysis reveals several weaknesses in the Statute concerning the definition of the grounds of criminal responsibility for the crime of genocide. The recommended solution is to improve the substantive quality of specific provisions of the Statute by introducing appropriate explanations to the Elements of Crimes.

Keywords: genocide, the Statute of the International Criminal Court, the Elements of Crimes, sanctioned norms

The interpretation of the provisions of the Statute of the International Criminal Court (hereinafter, the Statute) defining the grounds of criminal responsibility for the crime of genocide is the subject of many interpretative disputes. These disputes primarily arise from the ambiguity of many of its legal features, underscoring the difficulties in determining the scope of protected groups (national, ethnic, racial, and religious). The jurisprudence of the International Criminal Court (ICC) and the subject literature play an enormous role in combating this ambiguity. However, many of these disputes arise from the adoption of certain theoretical assumptions. These assumptions fall into one of two types. Assumptions of the first type are directly reflected in the text of the Statute, while those of the second type affect interpretation only because the interpreter is convinced of such a role. Therefore, the accuracy of both types of assumptions can be verified. Of course, it is not possible to address or challenge all of these assumptions here. Indeed, the range of Statute provisions delimiting the scope of criminalisation related to genocide is overwhelming. Accordingly, I only examine some of these provisions. This chapter focuses on assumptions that emerge in the process of reconstructing the norms of the Statute that prohibit genocide. This choice was prompted by the fact that the output of the related jurisprudence and literature appears unsatisfactory.

Of course, the reference to the category of the legal norm and the phase of its reconstruction requires clarification. The need for this clarification is due to the far-reaching substantive diversity in this area. Being convinced of the superiority of concepts of legal interpretation distinguished by the transparent and scientifically justified structure of both the object of legal interpretation and its goal, I present this explanation from the perspective of one of the leading concepts of this type, namely, from the perspective of the so-called “derivative concept of legal interpretation” developed by Maciej Zieliński.¹

This conception determines the structure of both the object of interpretation and its purpose. It also has the advantage of organising the process of legal interpretation in a comprehensive, highly ordered, and objective manner, limiting the margin for speculation. This conception assumes that the interpretation of a legal text is carried out through three sequential phases: namely, the order-oriented, reconstructive-oriented, and perception-oriented phases.² During the order-oriented

- 1 See Zieliński, 1972.; Zieliński, 2010.; Zieliński, 1987. This concept is used in many analyses of criminal law. See, for example, Pohl, 2007.; Kardas, 2011.; Burdziak, 2021. Zieliński's concept is also the basis for the textbook on Polish criminal law written by Łukasz Pohl. See Pohl, 2012. and subsequent editions of this work (2013, 2015, 2019). Ziemiński characterised this concept as follows: *‘More modern theory of M. Zieliński stresses the difference between legal provisions, i.e. sentence-like expressions of various verbal forms included in the text of a given legal act, and legal norms as norms of conduct worded univocally and directly. The interpretation of a legal text consists in reproducing (“decoding”) legal norms worded indirectly in that text [...]. The model reveals the structure of the process of interpretation of legal text. It does not have character of algorithm, though, it may be ordered in some perspicuously established pattern’*. See Ziemiński, 1987.
- 2 Initially, Zieliński distinguished more phases of the interpretation process: (I) “distinguishing process”, (II) “idiomatic decoding”, (III) “decondensation”, (IV) “uniting process”, (V) “non-idiomatic

phase, the moment of the validity of the legal provision and the validity of the verbal shape of the provision are established. In the reconstructive-oriented phase, the interpreter aims to obtain from the provisions of various syntactic structures the so-called “norm-shaped expression”³ that serves as the basis of the legal norm. This expression is characterised by a determined structure, in which one can distinguish four elements: (1) the addressee of the future legal norm, (2) the circumstances when the norm will be applied, (3) the normative (deontic) operator of the norm (shall/may), and (4) the behaviour regulated by the norm.⁴ Finally, the perception-oriented

decoding”, and (VI) “decoding for unification meaning”. See Zieliński, 1972, p. 84. Zieliński described these phases as follows: ‘Stage I (distinguishing process) encompasses activities aimed at distinguishing the characteristics of a concrete expression under interpretation. These characteristics are attributed to the given expression according to the means by which it words the norms. Since the distinguishing of the characteristics decides on the whole further process of interpretation in the given case [...]. The following ways of wording norms through expressions of a legal text are distinguished: 1. Direct or indirect, depending on whether the given disposition is or is not at the same time an expression of the common univocally characterised language; 2. Basic or non-basic, depending on whether the given disposition contains at least the operator of command in connection with the designation of behaviour or also the remaining elements of the norm of comportment (i.e. a designation of the subject or a description of the circumstances); 3. Singular or plural, depending on whether the disposition formulates one or more norms; 4. Univocal or ambiguous, depending whether the disposition is a univocal or ambiguous expression in that language; 5. Complete or incomplete, depending on whether it formulates all the elements in the norm (i.e. the designation of the subject, description of circumstances, operator of command, and description of behaviour) or some only; 6. Non-elliptical, depending on whether it is a non-elliptical or an elliptical expression (i.e. containing [a] relative expression without relativisation, [b] expression without quantification or designation, [c] references to other expressions, [d] shortened substituting expressions); 7. Adequate or inadequate, depending on whether the expression is in meaning independent form any other disposition of a legal text, or whether the text contains dispositions that complete, supplement, or modify it. [...]. The aim of the interpretation procedure of Stage II (idiomatic decoding) is to replace idiomatic expressions of a legal text with non-idiomatic ones. At this stage the choice is also made as to the meaning if the idiomatic expressions of the legal text are ambiguous. The interpretation procedure of Stage III (decondensation) is aimed at breaking up a given disposition which formulates norms plurally and replacing it with the different norm-like expressions coded in it. The procedure of Stage IV (uniting process) is aimed at finding in a legal text dispositions related in meaning to the norm-like expression obtained in the procedure of the preceding stages in such a way that they complete, supplement, or modify them. Hence, it is aimed at this stage to obtain a norm, or rather at this moment still a norm-like expression, which would be adequate to the legal text. The procedure of Stage V (non-idiomatic decoding) is to replace norm-like expressions containing elements which do not belong to the common language with norm-like expressions fully belonging to the common language. At this stage, the opportunity is also taken to choose the meaning if the elements of the norm-like expression that are being replaced are ambiguous in the language to which they belong. Finally, Stage VI (decoding for unification of meaning) consists of translating the norm-like expressions that belong to the common language but still contain ambiguous expressions into unequivocal expressions of the common language. This produces a legal norm after a final choice of meaning, if necessary’. Zieliński, 1972.

3 Zieliński also used the term “norm-like expression”; see Zieliński, 1972. However, in his later works, he used the term “norm-shaped expression”. See Zieliński, 1987. and Zieliński, 2010.

4 According to Zieliński: ‘The definition of norm of conduct differentiates four essential elements of the contents of norm: the qualification of the addressees, the qualification of the conduct ordered or forbidden, the qualification of circumstances in which the norm find its application, and the phrase expressing the element of order (prohibition). The definition does not formulate any proviso concerning connecting those elements in a syntactically correct whole. It is an unessential problem whether the norm has a

phase is the stage wherein the linguistic meaning of the elements indicated above are established, so as to achieve their unambiguity.⁵

The derivative conception of legal interpretation further assumes that in addition to the application of linguistic directives (connected with the perception-oriented phase of interpretation), systemic and functional directives should also be applied, that is, directives derived from the central assumption adopted in the conception of the so-called “rational legislator”.⁶ This assumption is supposed to eliminate the inconsistency of legal norms in the given system. Consequently, the ultimate goal of the process of interpretation is to decode a legal norm understood as an expression in the frame of a defined behaviour that is prohibited (by a deontic expression like “shall” or “may”) into a defined subject under the circumstances specified by this norm.

Regarding criminal law, contemporary reflection on the normative content of a provision defining the elements of a given type of crime (i.e. a prohibited act) clarifies that there are two legal norms encoded in such a provision: the sanctioning norm and the sanctioned norm.⁷ The sanctioning norm is addressed to the Court and, based on this norm, the Court imposes a penalty on the offender when a criminally relevant violation of the sanctioned norm occurs. In contrast, the sanctioned norm—the subject of the following analysis—is the norm whose violation implies the commission of a prohibited act by the perpetrator.⁸

verbal shape of the utterance: “If somebody possesses features A and is in circumstances O then he ought to perform act C,” or “Everybody who possesses features A and is in circumstances O, ought to perform act C,” or some other form’. See Zieliński, 1987. pp. 166–167.

- 5 Zieliński emphasised this as follows: ‘The term “norm of conduct” is to be understood as an expression which on the ground of the meaning rules of a given national language (independently of the occasional elements of situation) formulates in a direct way an order or a prohibition for the directly appointed subjects directly appointed conduct in a given situation’. See Zieliński, 1987, p. 165.
- 6 Leszek Nowak created this concept. See Nowak, 1987. pp. 137–145. This concept has been discussed in many works. See, for example, Nowak, 1968.; Nowak, 1973.; Wróblewski, 1979.; Kustra, 1980.; Wronkowska, 1987.
- 7 The concept of a norm sanctioned in criminal law was developed by Pohl. See Pohl, 2007.
- 8 Zieliński explained the process of reconstructing these norms as follows: ‘Art. 148 para. 1 Polish Penal Code (1969–this act is no longer in force in Poland) declares: Who kills a man shall be liable to at least 8 years of imprisonment or the death penalty. This provision contains only one sentence situated in the special part of Polish Penal Code and following the stylistics of Polish legislation this provision should be characterised as the basic one. This provision should be decoded as an idiomatic one. But the provisions of this type must also be “decondensated” by splitting it into at least three norm-shaped expressions which outline: (N1) the sanctioned norm, prohibiting the homicide; (N2) the sanctioning norm, ordering to sanction the homicide by at least 8 years of imprisonment or the death penalty; (N3) the norm granting the competence to sentence in this way. Art. 148 para. 1 of PPC has a character of a plural provision and its de-idiomatization leads to its deconcentration as well. In the effect of de-idiomatization, one receives three separate norm-shaped expressions and the further interpretation of them is to be performed in separate ways. In the present example, we will fix our minds on the further process of interpretation of N1. The expression N1, “Anybody ought to forbear from killing a man,” does not need any supplement. In principle, this provision contains all essential elements of a norm of conduct. Otherwise, the expression N2 ordering the sanction of homicide ought to be supplemented by mentioning the addressee of the sanctioning norm, i.e. the agency of administration of justice obliged to sentence the killer. Subsequently, one is to investigate whether the legal text contains some provision modifying

As the contemporary theory of criminal law emphasises, such a general definition of the sanctioned norm requires a number of additional restrictions limiting its scope. For the purposes of this chapter, four are worth mentioning here. According to the first assumption, the behaviour regulated by the sanctioned norm is only “an act” when it is caused by the will of its subject.⁹ The second assumption holds that only behaviour that is socially unacceptable—that is, behaviour by which its subject violates the rules of conduct considered binding in society with respect to a legally protected good—can be covered by the sanctioned norm.¹⁰ The third presumption, which occurs when the causing of a specific effect is prohibited under penalty, assumes that the scope of regulation by the sanctioned norm is only extended to the effect caused by the perpetrator (this refers to the causal relationship, that is, the ontological basis for imputing the effect) and attributable to the perpetrator due to the fulfilment of the conditions for its objective imputation (this refers to the normative relationship, that is, the normative basis for imputing the effect).¹¹ Finally, an important rule limiting the scope of regulation by the sanctioned norm concerns the requirement that the form of the subjective feature of the criminal act must be located within this scope.¹²

the content of the expression of N1, N2, or N3. The solution to the problem needs only knowledge of the complete legal text but also of Polish juristic doctrine formulating the particular directives of interpretation. Those directives are not codified and the interpreter sometimes has to choose from among directives to be applied. For instance, he has to decide about the connection between art. 148 para. 1 PPC and the provisions concerning self-defence, necessity, execution of a capital punishment, between the basic provision in question and the other provision of a special part. Of PPC, the transitional provisions, and so on. In the result of the accepted particular directives, after appropriate modifications, expression N1 assumes the following shape: “Any man who is not a mother acting towards her child under influence and in the time of parturition, and who is not a person under the influence of deep emotion, on demand and under a pity acting in self-defence repealing the direct lawless attempt against some social or individual good (without excessus defensionis), and is not an authorised person executing the death penalty, and who is not a person acting against enemy in the war time in the way defined by the material law, in every circumstances beginning from the 1 January 1970 ought to forbear from killing and even not to attempt to kill other man.” (Homicide in other circumstances is forbidden by other provisions of special part of PPC.) The above formulated expression is not a sufficiently precise norm of conduct, because it contains some equivocal terms. For instance, it is necessary to fix the exact meaning of the term “to kill.” It must be explained whether the behaviour in question consists in causing the clinical or biological death, the active behaviour or omission of some activity, the killing of other man or also a suicide. Fixing of a strictly univocal meaning of the considered expression is difficult because there is a lack of explaining provisions and the linguistic context is not very useful in this case. Thus, the interpreter must use the functional rules of interpretation to establish a precise sense of the norm-shaped expression and to formulate an adequate legal norm. Subsequently, he is to realise the task of much more complicated interpretation of the expressions N2 and N3 taking into account a lot of provisions modifying the content of those expressions’. See Zieliński, 1987. pp. 175–177.

- 9 Many works deal with the concept of “act” in the Polish science of criminal law. See, for example, Wolter, 1956.; Kubicki, 1975.; Mąciór, 1990.; Konieczniak, 2002.; Pohl, 2017. See also Wright, 1963. and Patryas, 1988. pp. 9–76.
- 10 This condition is particularly emphasised when explaining the structure of unintentional crimes. In Polish literature, see first and foremost, Mąciór, 1968.; Buchała, 1971.; Bczyk, 2016.
- 11 In Polish literature, J. Giezek devoted special attention to these issues. See Giezek, 1994.
- 12 See Pohl, 2007, pp. 110–134.

The derivative conception of legal interpretation also stresses the need to indicate the central provision containing the indicated norm (legal qualification)—the provision that serves as the basis for the legal qualification of the offender's criminal act.¹³ Here, it should be noted that for all crimes under the jurisdiction of the ICC, the provision of the Statute containing the norms prohibiting the commission of crimes is Article 25(2). As the legislator indicates in this article, a person who has committed a crime under this jurisdiction is individually criminally responsible and punishable under the Statute. Of relevance here, the provision of Article 6 of the Statute, which defines the term “genocide”, makes the content of this norm adequate. Its role in establishing the content of the grounds for statutory criminal responsibility for genocide is of core importance. After all, as is well known, it is this provision that defines the concept of genocide under the Statute. Nevertheless, Article 6 does not indicate that genocide as defined therein is a prohibited act, as it lacks deontic expression. According to theory of criminal law, the legal qualification of the offender's act does not contain additional provisions that define the expression relevant to criminal responsibility. It should be noted, however, that this view is only accurate for such regulations where the verbal shape of the main provision allows for identifying the prohibited behaviour, that is, the basis for the offender's criminal liability. This is clearly not the case in Article 25(2) of the Statute. Therefore, it should be assumed that the legal qualification of genocide must also include Article 6 of the Statute. Indeed, its absence in this legal qualification would eliminate its function of indicating which crime under the jurisdiction of the ICC has been committed by the perpetrator.

Having established the above assumptions, it is now possible to proceed to a preliminary characterisation of the content of the sanctioned norms prohibiting genocide in terms of the Statute. Given the definitional function indicated above, the point of departure here must be Article 6 of the Statute, which states:

For the purposes of this Statute, “genocide” means any of the following acts committed with the intent to destroy in whole or in part a national, ethnic, racial or religious group, such as:

- (a) the murder of group members;*
- (b) causing serious bodily harm or mental health disorder of group members;*
- (c) the deliberate creation for a group of living conditions calculated to cause its total or partial physical destruction;*
- (d) the application of measures to stop births within the group;*
- (e) forcibly transferring children of group members to another group.*

13 See Zieliński, 1987. p. 173. M. Zieliński stated this directly: ‘First of all, in the “distinguishing stage,” the interpreter should perform the preliminary multi-sided analysis of the given provision or rather of a set of provisions in question. The interpretation of a provision which contains a conjunction of propositions must be realised by the separate analysis of those elements of the provision. The interpreter must recognise the position of a given provision in the structure of the legal text as a basic provision or as a subsidiary one [...]’.

As shown above, Article 6 is a collection of several provisions marked with separate letters. Each of these provisions provides the definition of genocide. From a semantic perspective, it can be said that the legislative technique used in Article 6 of the Statute—a direct reference to the technique used in Article 2 of the Convention on the Prevention and Punishment of the Genocide—enables us to delimit the scope of the name/term “genocide” in the Statute (descriptive perspective) by indicating that genocide consists of the behaviours described in Article 6. However, this stance may be deceptive from a normative point of view, as it does not adequately communicate the fact that genocide is prohibited not under one sanctioned norm, but under many sanctioned norms. Indeed, from a normative point of view, based on the aforementioned assumptions on the structure of the legal norm, Article 6 of the Statute presents itself as a collection of provisions containing various sanctioned norms. Put briefly, one can say that the multiplicity of legal provisions is determined by grammatical and punctuation elements, while the multiplicity of legal norms is established by the generic difference of behaviours specified in these provisions. It is worth reiterating that the object of a norm, and thus the central component of its scope of regulation, comprises only one type of behaviour.¹⁴ Clearly, Article 6 of the Statute indicates various behaviours.

The observation above is crucial from a practical point of view, as it allows for the precise formulation of the legal qualification of behaviours bearing the hallmarks of genocide. As the outline of the normative content of Article 6 demonstrates, in this article, the legislator provides the basis for such an interpretation of Article 25(2) of the Statute in the context of genocide. Accordingly, it is necessary to speak not of one crime of genocide but of many different crimes of genocide—crimes distinguished on the assumption that the criminalisation of genocide is founded on many sanctioned norms prohibiting various types of behaviour.

Given the limited scope of this chapter, it is impossible to present all of these norms in detail. Put simply, because of the definition of genocide set out in Article 6 of the Statute, we can distinguish the following sanctioned norms: first, prohibition of the killing of members of the protected group; second, prohibition of the infliction of grievous bodily or mental harm on members of the protected group; third, prohibition of the creation of living conditions for the protected group calculated to bring about its physical destruction in whole or in part; fourth, prohibition of the use of measures aimed at stopping births within the protected group; and fifth, prohibition of the forced transfer of children of members of the protected group to another group.

Of course, each of these norms should be supplemented by information specifying its addressee and the circumstances of its application. Such information should be added immediately and without difficulty. After all, there is no doubt that the addressee of these norms is, in principle, any human being (due, *inter alia*, to the irrelevancy of the public function underlined by Article 27 of the Statute), and that the

14 See Pohl, 2007.

circumstances of their application extend to all situations, in accordance with Rafal Lemkin's initial contention that genocide is a crime in both wartime and peacetime.¹⁵

The indicated norms should also be supplemented with information specifying the form of the subjective aspect required by Article 6 of the Statute for each variant of genocide, that is, the intention to destroy the protected group in whole or in part.

The observation that Article 6 of the Statute provides a basis for interpreting Article 25(2) in the context of genocide (i.e. that the provision of the latter contains different sanctioned norms prohibiting "varieties of genocide") is relevant in cases where the perpetrator has committed genocide by violating more than one of the indicated norms. Certainly, in the given situation, the adequate legal qualification of these behaviours will be legally complex, a fact reflected in the need to point to the relevant (as distinguished in Article 6 of the Statute) provisions (a, b, c, d, e). In short, the outlined normative analysis, one centred on the legal norm and the distinction between legal norm and legal provision, allows us to resolve the issues of unity and multiplicity of offences. There is no doubt that a competing approach may lead to a lack of precision in this sphere, which, as is well known, may consequently be perceived as a serious violation of substantive law not respecting the principle of material truth.

These nomological findings should also be applied to the interpretation of Article 25(3) of the Statute, according to which:

Criminal liability and punishment for crimes within the jurisdiction of the Court shall be imposed under this Statute on a person who:

(a) commits such a crime alone, jointly with another person or through another person regardless of whether that other person is criminally liable;

(b) orders, induces or solicits the commission of such a crime, whether committed or attempted;

(c) for the purpose of facilitating the commission of such a crime, aids, abets or otherwise contributes to the commission or attempt thereof, including providing the means for the commission thereof;

(d) in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose; such contribution must be intentional and must:

(i) be undertaken for the purpose of facilitating the criminal activity or criminal purpose of the group, where the activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

(ii) be undertaken with knowledge of the group's intention to commit the crime;

(e) in the case of the crime of genocide, directly and publicly incites the commission of genocide;

(f) attempts to commit such a crime by undertaking actions initiating its commission, but such commission does not occur for reasons beyond the person's intention; however, a person who abandons efforts made to commit a crime or

15 See Lemkin, 1944, p. 79. See also Nsereko Ntanda, 2000.

otherwise prevents its commission shall not be liable to punishment under this Statute if the person completely and voluntarily abandons the criminal intent.

Without undertaking a detailed interpretation of Article 25(3), it should be pointed out that provision Article 25(3)(a) indicates that the previously distinguished sanctioned norms prohibiting genocide can also be violated jointly with another person. This framing constructs the formula of co-perpetration.¹⁶ The theory of criminal law raises doubts as to whether it is co-perpetration in the case of an arrangement characterised by the division of roles, that is, an arrangement where the co-perpetrators do not realise all of the objective elements of the aforementioned variant of the genocide, but only part of them. Accepting the variant that co-perpetration consists of the partial realisation of the statutory features of a given crime—a variant supported by both ICC jurisprudence and the literature—introduces another sanctioned norm into the legal system, one that prohibits the partial realisation of the genocide elements.

However, the normative status of the crime of genocide committed through another person—behaviour considered the most closely connected to the construction of indirect perpetration—is debatable.¹⁷ The construction of indirect commission is highly questionable, as it is based on the assumption that a prohibited act can be committed via a behaviour different from that of “the perpetrator” (direct perpetrator), namely, the behaviours indicated in points a–e of Article 6. The problematic nature of the construction of indirect perpetration is also due to its dependent (accessory) character. Given that the condition for the realisation of indirect perpetration is the performance of the forbidden act by the direct perpetrator, it follows that the non-performance of the crime of genocide entails the absence of indirect perpetration. Nevertheless, there is no doubt that in the modern theory of criminal law, constructions based on such dependency have been abandoned in favour of an individualistic perspective, as the former violate the standard of equality and are incompatible with the scheme of the legal norm.

Most significantly, however, the framing of the form of perpetration of the crime of genocide appears to violate the principle of *nullum crimen sine lege*, because the provision of Article 25(3)(a) of the Statute does not indicate what the conduct of the perpetrator would comprise in the case of indirect perpetration. The connection with indirect perpetration suggests the idea that the discussed concept is based on conduct consisting of directing the execution of a crime of genocide and instructing a dependent person (i.e. someone dependent on the person who gives the instructions) to execute that crime. Therefore, the question of the sanctioned norms prohibiting indirect perpetration is one that requires in-depth analysis. Here, too, the role of ICC case law cannot be overestimated. An adequate clarification of perpetration through

16 This formula has been the subject of many works in the Polish science of criminal law. See, for example, Tyszkiewicz, 1977.; Kardas, 2001, pp. 446–491.

17 This construction has also been the subject of many works in the Polish science of criminal law. See, for example, Buchała and Kubicki 1988.; Kardas, 2001, pp. 261–278.

another person by the Elements of Crimes should also be recommended. Of course, this recommendation might be problematic due to the wording of Article 9(1) of the Statute, as this provision *verba legis* indicates that the Elements of the Definition of Crimes are only intended to assist in interpreting and applying Articles 6–8 of the Statute. Arguably, however, the close connection between the crime defined in these provisions and indirect perpetration (a connection in that indirect perpetration is a means of committing the crime) ultimately allows for the inclusion of such an explanation in the Elements of Crimes. The question of how to frame this definition requires further research. That said, it may suffice to reformulate this definition to indicate that indirect perpetration is the act of directing or ordering the execution of a crime by a person who is actually or formally dependent on the principal.

The conduct set out in Article 25(3)(b) poses fewer difficulties as forms of behaviour constituting indirect perpetration. In case of behaviours typified in Article 25(3)(b) (i.e. the commission, incitement, and inducement to commit the crime of genocide), sanctioned norms are separated from norms prohibiting particular varieties of the crime of genocide (typified in Article 6). This is due to the indisputable fact that the conduct indicated is of a different kind to that defined in Article 6 of the Statute. They can thus be referred to as so-called “non-executive forms” of criminal collaboration. It is also worth emphasising that, in the case of non-executive forms, the violation of the sanctioned norms is independent of the execution of the crime of genocide. In short, the crimes set out in Article 25(3)(b) are formal offences. It is also worth noting that the wording of Article 25(3)(b) is not perfect. Indeed, listing “persuasion” alongside “inducement” is superfluous, as, according to the semantic perspective, persuasion is a means of inducement.

On the other hand, the scope of Article 25(3)(c) of the Statute raises serious problems of interpretation. This provision criminalises the contribution to the commission or attempted commission of the crime of genocide by facilitating its commission or attempted commission. The mentioned article indicates that aiding and abetting are examples of how this contribution can be realised. However, aiding and abetting as mentioned in this provision are flawed constructions from a legal stance, as they do not indicate the connected behaviours.¹⁸ In short, Article 25(3)(c) does not indicate either the conduct to which aiding and abetting would be relativised or the conduct to which the instigator would incite. Consequently, the exemplary enumeration of aiding and abetting in Article 25(3)(c) fails to fulfil its intended role because it does not bring us any closer to understanding the phrase “the contribution to the commission or attempted commission” of the crime of genocide. Consequently, in addition to the explanatory interpretation of the ICC, it would be appropriate to recommend clarifying these issues in the Elements of Crimes. Evidently, contribution

18 It is clear that abetting and aiding are constructs that require relativisation towards the other person's behaviour; for instance, there is no general abetting, but there is abetting to genocide. In the Polish legal literature, this condition in the construction of abetting and aiding has been emphasised in many works, including: Pohl, 2019. pp. 202–206.

to the crime of genocide is a highly indeterminate form of behaviour. For this reason, it is challenging to consider “the contribution to the crime” as an appropriately defined object of criminal law regulation, underscoring the need for its clarification in the Elements of Crimes.

Among the issues related to Article 25(3)(c), the only passage of this provision that seems to be correctly formulated is the final passage, which indicates that providing means for the commission of the crime of genocide is prohibited under penalty. Although this passage is an example of a casuistic regulation, in Article 25(3)(c), the legislator *expressis verbis* indicates that the act of “providing the means” is included in the crime of genocide. Therefore, the genocide context is directly connected with the prohibited behaviour in the text of the Statute. An essential element of the norm prohibiting contribution to genocide is the condition that the contribution is carried out with the aim of facilitating the commission or attempted commission of the crime of genocide. In this respect, *mens rea* takes the form of a direct intention (*dolus coloratus*). Putting aside the legitimacy of the use of direct intent, this choice might be considered controversial because it excludes behaviour not conducted with the aim of facilitating the commission or attempted commission of genocide. Arguably, it would be better to use the construction of “broad intention” here, including the formula of *dolus eventualis*.

The solution adopted in Article 25(3)(d) should be considered a development of the construct of contribution to the commission or attempted commission of the crime of genocide. This provision refers to any other intentional contribution to the commission or attempted commission of the crime of genocide by a group of persons acting with a common purpose. This regulation is partly redundant. As noted earlier, when the contribution is made for the purpose of facilitating the crime of genocide, it falls within the scope of Article 25(3)(c). In contrast, this regulation is of core value when the contribution to the commission or attempted commission of genocide by the group is carried out by an individual who is aware that the given group has an intention to commit this crime.

At first glance, the regulation under Article 25(3)(e) seems to be redundant. After all, the provision refers to direct and public incitement to commit genocide and, as mentioned, incitement to the crime of genocide is already regulated by Article 25(3)(b). However, deeper analysis of Article 25(3)(e) leads to the conclusion that, according to the Statute, incitement includes conduct that does not necessarily have an individualised recipient (addressee) *ad incertam personam*. It is precisely this kind of incitement that Article 25(3)(e) deals with. That said, national legislators rarely recognise this construction.

Finally, according to Article 25(3)(f), attempting the crime of genocide is also prohibited conduct. This provision specifies that “an attempt” refers to the taking of action that initiates the commission of a crime. It thus opts for a narrow view of “an attempt”, with the initiation of the performance of a prohibited act considered the minimum condition for an attempt. Such a narrow approach to the attempt to commit the crime of genocide is an unconvincing solution. Numerous national

criminal law systems adopt a different conception, according to which an attempt is behaviour that starts earlier, namely, at the moment the perpetrator directly aims at performing a prohibited act.¹⁹ Moreover, the narrow view of “an attempt” is surprising because the Statute does not provide for the criminalisation of the preparation to the crime of genocide.

The normative analysis outlined above and tentatively sketched here reveals several weaknesses in the Statute concerning the definition of the grounds of criminal responsibility for the crime of genocide. Although these weaknesses will be addressed to a greater or lesser extent by the jurisprudential activity of the ICC, it is worth keeping in mind that the Court’s activity in this regard is limited by the norms of Article 22(2) of the Statute, which prescribe a strict interpretation of the definition of crimes and prohibit the use of analogy resulting in an extensive interpretation of the definition of crimes. A recommended solution is to improve the substantive quality of specific provisions of the Statute by introducing appropriate explanations to the Elements of Crimes. I consider this means of amendments to be the most practical, particularly as it is widely established that doing so is unlikely to lead to the revision of the provisions of the Rome Statute. I thus believe that such changes are advisable.

While this issue lies beyond the remit of this chapter, it is worth noting that there are growing doubts in the literature regarding the inclusion of the scope of protected groups in the definition of genocide under Article 6. Indeed, this view rightly observes that groups other than those indicated in current version of Article 6 should also be included. Personally, I find opinions postulating the inclusion of political groups, groups with a different perspective on life, and social groups to be most persuasive. The proposed solution is nothing new. Indeed, it is partly provided for by the Polish Penal Code in Article 118, § 1 of which reads:

Anyone who murders or causes grievous bodily harm to a person belonging to any ethnic, racial, political or religious group, or a group with a different perspective on life, with the purpose of partially or completely annihilating such group shall be liable to imprisonment for a minimum term of 12 years or life imprisonment.

Moreover, according to § 2:

Anyone who, acting with the intention specified under § 1, creates living conditions threatening the biological annihilation of the members of such a group, or uses means to prevent births within this group, or forcibly removes children from those belonging to such a group, shall be liable to imprisonment for a minimum term of 5 years to 25 years’ imprisonment.

19 The Polish criminal law literature contains many works on the construct of attempting to commit a crime. See, for example, Rejman, G. 1965. For instance, according to the Polish Penal Code: ‘Anyone who intends to commit a prohibited act and makes a direct attempt that is subsequently not completed shall be held liable for an attempt’ (Article 13 § 1).

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EVOLUTION OF THE DEFINITION OF CRIMES AGAINST HUMANITY UNDER INTERNATIONAL CRIMINAL LAW



TAMÁS HOFFMANN

Abstract

The evolution of the definition of crimes against humanity under international criminal law reflects a significant shift in the treatment of civilian populations by states, transitioning from a domain reserved for state discretion to one governed by international law. This chapter traces the historical development of the concept, beginning with 19th-century articulations of the principle of humanity, through its codification in the Nuremberg Charter post-World War II, to its current status under the Rome Statute of the International Criminal Court (ICC).

Initially, the principle of humanity was invoked in the context of war and humanitarian law. However, it wasn't until the atrocities of World War I, particularly against Armenians, that the term "crimes against humanity" emerged, leading to the first international legal accountability efforts.

The Nuremberg Trials marked a pivotal moment, defining crimes against humanity as acts committed against civilian populations in connection with war crimes. This definition initially required a nexus to armed conflict, a requirement that has evolved over time. Subsequent tribunals, such as the ICTY and ICTR, expanded the scope of these crimes, allowing for prosecution in peacetime and clarifying the contextual elements necessary for establishing such crimes.

The Rome Statute further codified these developments, defining crimes against humanity as acts committed as part of a widespread or systematic

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attack against civilians, without necessitating a link to armed conflict. Despite this progress, ambiguities remain regarding the interpretation of "other inhumane acts" and the necessity of state or organizational policy. The ongoing discourse around these issues highlights the dynamic nature of international criminal law and its capacity to adapt to emerging global challenges, underscoring the importance of crimes against humanity in addressing future injustices.

Keywords: Crimes against humanity, Martens Clause, Nuremberg Tribunal, ICC, ICTY

1. Introduction

Crimes against humanity, similar to other international crimes, have a relatively recent provenance. While often overshadowed by genocide, it is a revolutionary concept that, for the first time in history, declared that state discretion over the treatment of civilian populations, which was traditionally in the *domaine réservé* of states, should be limited by international law.

In this chapter, I first introduce the genealogy of crimes against humanity from the 19th-century invocations of the principle of humanity to its first codification in the Charter of the International Military Tribunal and its resurgence in the 1990s. Subsequently, I focus on the most important contextual elements of this crime category, and conclude by identifying certain unspecified aspects of crimes against humanity.

2. The Regulation of Crimes against Humanity in International Law

2.1 Legal Development before the Second World War

Since the 19th century, the international community has repeatedly declared the principle of humanity to be one of the fundamental attributes of civilisation and has publicly condemned its violation. The Declaration on the Prohibition of the Slave Trade adopted at the Congress of Vienna in 1815 by the European Great Powers, for example, stressed that the slave trade 'has been regarded by enlightened men of all

ages as repugnant to the principles of humanity and universal morality... and finally, the public voice in all civilised countries calls aloud for its prompt suppression'.¹

Although the standard of "civilisation" was a highly exclusionary and racist concept employed against non-Western states,² it was also closely linked to basic ethical standards and employed as a rhetorical argument to limit violence during wars. The St Petersburg Declaration of 1868, which prohibited the use of explosive projectiles of less than 400 grams, stressed that 'the necessity of war must be subordinated to the requirements of humanity' since 'the progress of civilisation should limit as far as possible the hardships of war'.³ The principle of humanity finally became entrenched in the laws of war with the adoption of the 1899 Hague Convention (II) with Respect to the Laws and Customs of War on Land. The Convention pronounced in its preamble:

*Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.*⁴

This formulation has since become one of the defining formulas of international humanitarian law, known as the Martens Clause.⁵ The Martens Clause was reiterated in the preface to Convention IV on the Laws and Customs of War, adopted at the Second Hague Peace Conference in 1907, stressing that 'to serve, even in this extreme case, the interests of humanity and the ever progressive needs of civilization' was of paramount importance.⁶ This wording, in a slightly modified version, also

- 1 *Déclaration du Congrès de Vienne en date du 8 février 1815 au sujet de l'abolition de la traite des nègres d'Afrique*. The renowned French philosopher, Denis Diderot, even referred to humanity as 'the only truly inalienable right'. However, Zagor points out that the reference to international public opinion in the Declaration primarily referred to the internal British political polity and that it is unclear how much the idea of humanity actually permeated international relations. Zagor, 2011.
- 2 See further Obregón, 2013.; Hoffmann, 2015.
- 3 *Déclaration à l'effet d'interdire l'usage de certains projectiles en temps de guerre*. Saint Petersburg, 11 December 1868.
- 4 Preamble, *Convention (II) with Respect to the Laws and Customs of War on Land and Its Annex: Regulations concerning the Laws and Customs of War on Land*. The Hague, 29 July 1899.
- 5 One of the leading international lawyers of the era, Fyodor Fyodorovich Martens, served as head of the Russian delegation that convened the Peace Conference. Martens tried to break a diplomatic deadlock between Germany and Belgium over a debate concerning the issue of "levée en masse", that is, the direct participation of civilians in hostilities during an invasion. While the proposed compromise did not explicitly espouse the Belgian position, it allowed it to be considered in future applications of the Convention by appealing to customary law and international public opinion. See Cassese, A. 2000.; Giladi, 2014.
- 6 Preamble, *Hague Convention (IV) respecting the Laws and Customs of War on Land and Its Annex: Regulations concerning the Laws and Customs of War on Land*. The Hague, 18 October 1907.

appeared in Additional Protocol I to the Geneva Conventions of 1949,⁷ and in various forms in several other international treaties regulating the means and methods of warfare.⁸

From early on, the notion of humanity was ambiguous: it could refer to “humanness”, that is, the quality of the individual as a human being, as well as to “humankind” as the collective human race.⁹ Thus, condemning an atrocity as a violation of the principle of humanity could be understood to express its particularly heinous nature but also the idea that it is an affront to the entire human race, and as such, it requires international prosecution. However, the codification of the principle of humanity at the beginning of the 20th century did not create individual criminal responsibility. Since classical international law, starting from the doctrine of unlimited internal jurisdiction, did not consider the individual as a subject of international law and considered the regulation of their status essentially a sovereign monopoly of the state, even the most serious inhumane acts committed by a state against its own civilian population did not violate international law. The first attempt to change this arose in the wake of the deportation and killing of hundreds of thousands of Armenians in the Ottoman Empire during the First World War.¹⁰

On 24 May 1915, France, Great Britain, and Russia issued a joint declaration calling the events “crimes against humanity and civilisation”,¹¹ the perpetrators

7 Article 1(2) of Additional Protocol I provides that

In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, UNTS Vol. 1125, 3.

The preamble of Additional Protocol II similarly emphasises “in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience”. Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-international Armed Conflicts, UNTS Vol. 1125, 609.

8 For instance, the preamble of the Second Additional Protocol to the 1954 Hague Convention states that ‘the rules governing the protection of cultural property in the event of armed conflict should reflect developments in international law’. Second Protocol to the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 26 March 1999. UNTS Vol. 2253, 172. In the same vein, the 1998 Ottawa Convention stresses ‘the role of public conscience in furthering the principles of humanity as evidenced by the call for a total ban of anti-personnel mines...’ Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Oslo, 18 September 1997. UNTS Vol. 2056, 211.

9 Macleod, 2010.

10 In the spring of 1915, a series of pogroms were carried out against the Christian Armenian population in the Ottoman Empire, who were considered allies of the Entente. The survivors were subjected to deportation, with further sacrifices and their property confiscated. The atrocities resulted in hundreds of thousands of deaths -- some estimates put the death toll at as many as 1,500,000. For more details, see Dadrian, 1995.

11 The original draft referred to “crimes against Christianity and civilization”; however, it was changed because Great Britain and France were concerned that an overt reference to Christianity might alienate their Muslim subjects and affirm the Turkish narrative. See Matiossian, 2022.

of which would be held “personally responsible”.¹² Later, the Western occupying powers in Turkey indeed conducted several prosecutions before special court martials against some of the alleged culprits between 1919 and 1920.¹³ It was precisely because of the atrocities committed against the Armenians that the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties established by the Entente Powers proposed that, in addition to violations of the law of war, violations of the “elementary laws of humanity” should also be prosecuted before an International Criminal Tribunal set up for that purpose, and explicitly invoked the Martens Clause as the applicable law.¹⁴ The Commission argued that the rules of war to protect the civilian population of an enemy country should be extended to cover its own population and that violations of those rules should also be prosecuted.¹⁵ However, this proposal ultimately failed, as the US and Japanese representatives took the view that criminalising violations of the law of war would constitute *ex post facto* legislation; in other words, it would violate the principle of *nullum crimen sine lege*.¹⁶

However, Article 230 of the Sèvres Peace Treaty stipulated that

The Turkish Government undertakes to hand over to the Allied Powers the persons whose surrender may be required by the latter as being responsible for the massacres committed during the continuance of the state of war on territory which formed part of the Turkish Empire on August 1, 1914.

However, this treaty never entered into force, and the Lausanne Peace Treaty concluded between Turkey and the Entente Powers no longer contained any reference to accountability.

2.2. Legal Developments after the Second World War

The horrors of the Second World War showed once again that the basic regulatory framework of the laws of war based on the traditional notion of exclusive domestic jurisdiction, which only considers the population of the enemy state as protected persons, is inadequate. The Third Reich committed mass inhumane acts against its own citizens and those of its allies for political, racial, or religious reasons, and the United Nations War Crimes Commission recommended as early as 1943 that the scope of criminal prosecution should be extended beyond war crimes.¹⁷ On 8 August

12 United Nations War Crimes Commission, History of the United Nations War Crimes Commission and the Development of the Laws of War (His Majesty's Stationery Office, 1948) 35.

13 See Balint, 2013.

14 “Commission on the Responsibilities of the Authors of War and on Enforcement of Penalties -- Report Presented to the Preliminary Peace Conference” (1920)

15 See Boot, 2002.

16 “Commission on the Responsibilities”, 141-144.

17 See more in detail von Lingen, 2014.

1945, the four major powers occupying Germany (the United States, the Soviet Union, Great Britain and France) established the Nuremberg International Military Tribunal (IMT), whose sole task was to hold accountable the 24 military, political, and economic leaders most responsible for German war crimes.¹⁸ For the first time in history, an international criminal forum was created to prosecute international crimes.¹⁹

Even though the British Foreign Office vehemently opposed the idea of investigations of ‘atrocities committed on racial, political or religious grounds’ until May 1945,²⁰ the Statute of the Nuremberg IMT explicitly included a new category of crimes committed against the civilian population within its jurisdiction.²¹ Crimes against humanity were defined in Article 6(c) of the IMT Statute as:

murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian populations, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

This definition links the commission of crimes against humanity to war, that is, an international armed conflict (*nexus* requirement) and, thus, treats them as an extended version of war crimes, on the basis that aggressive war is the most serious international crime.²² However, it should be added that there were also political reasons for the war nexus requirement, as the Allies were concerned that abuses in democratic regimes, such as racial discrimination and colonial exploitation, might qualify as crimes against humanity. This motive was laid bare in a correspondence between Telford Taylor, one of the drafters of the Nuremberg Tribunal Statute and US Military Advocate General from 1946 to Howard Petersen, US Assistant Secretary of War. In February 1947, Taylor stated,

18 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 1945.

19 In addition to the prosecution of the main Nazi criminals, the International Military Tribunal for the Far East (IMTFE) was set up in 1946 by order of General Douglas MacArthur, the Allied Commander-in-Chief in the Far East, on the model of the Nuremberg Tribunal, with its seat in Tokyo, to try the 28 main Japanese war criminals with the same subject-matter jurisdiction as the IMT. On the IMTFE see Cohan and Totani, 2018.

20 Kochevi, 1995.

21 The term “crimes against humanity” was proposed by the renowned international lawyer Hersch Lauterpacht to Robert Jackson, who was the US representative and later the Chief Prosecutor of the Tribunal. See Koskeniemi, 2004., Lauterpacht, 2010.

22 In its judgement, the Tribunal stresses:

“War is essentially an evil thing. Its consequences are not confined to the belligerent states alone, but affect the whole world. To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.”

Nuremberg Trial Proceedings, Monday, 30 September 1946.

*My own view is that departures from democratic systems as may exist in some countries and discrimination, even quite aggravated such as may exist against neg...s in certain countries, should not even, in these enlightened times, constitute crimes at international law.*²³

However, during the subsequent Nuremberg proceedings, Taylor charged the defendants with crimes against humanity committed in peacetime.²⁴

It should be noted that Council Law No. 10, adopted by the Allied Control Commission, which defined the substantive law applicable by occupying Military Tribunals, did not provide for a war nexus; that is, technically, crimes against civilians committed before the outbreak of the Second World War could also be considered crimes against humanity. Nevertheless, the US Military Tribunals were sharply divided on the issue: the judgements in the Justice²⁵ and *Einsatzgruppen*²⁶ trials ruled, in principle, that there was no need for a war nexus; however, in the Pohl,²⁷ Flick,²⁸ and Ministries²⁹ cases, they took the opposite view.

Based on the above, it seems that the war nexus was generally regarded as the indispensable element of crimes against humanity, but international criminal law gradually recognised that crimes against humanity can also be committed in peacetime.³⁰ However, it is not clear when this requirement ceased to apply. In the Korbély case, the European Court of Human Rights stated that the war nexus ‘may no longer have been relevant in 1956’;³¹ however, many legal scholars argue that this development only occurred at a later stage.³²

With the creation of the category of crimes against humanity, a new international crime emerged, which penalised acts against civilians that were contrary to fundamental human values. This was undoubtedly a revolutionary innovation in the emerging field of international criminal law; however, it had an uncertain material scope of application. The Statute did not provide a close enumeration of all

23 Quoted in Heller, 2011.

24 Ibid.

25 The Tribunal concluded,

The statute is limited by construction to the type of criminal activity which prior to 1939 was and still is a matter of international concern. Whether or not such atrocities constitute technical violations of laws and customs of war, they were acts of such scope and malevolence, and they so clearly imperiled the peace of the world that they must be deemed to have become violations of international law.

Altstoetter and Others (Justice), TWC, Vol. III., 974.

26 Einsatzgruppen, TWC, Vol. IV., 499.

27 Pohl, TWC, Vol. V., 991-2.

28 Flick, TWC, Vol. VI., 1212-3.

29 Ministries, Order Dismissing Count Four, TWC, Vol. XIII., 115-117.

30 Ratner, Abrams and Bischoff, 2009.

31 Korbély v. Hungary, ECHR, Grand Chamber, Application No. 9174/02, 19 September 2008, para. 82.

32 According to Ford, the end of the war nexus may have occurred sometime between 1968 and 1984. Ford, 2007. Abrams, and Bischoff 2009, 323 argue that it had certainly occurred by 1975 but admit that this claim is “certainly debatable”.

prohibited acts, as it referred to “other inhumane acts” allowing for future expansion through customary development. The drafters also failed to define the contextual elements of crimes against humanity; that is, the circumstances in which inhuman acts committed would constitute an international crime. Furthermore, it had a residual quality, as the Tribunal applied it almost exclusively in a complementary manner to crimes against peace and war crimes. In only two cases, Streicher and von Schirach, did the Nuremberg Tribunal find the defendants solely guilty of crimes against humanity. However, even here, the Nuremberg Tribunal did not elaborate on the precise elements of the definition of an attack against a civilian population. One possible reason for this restraint was the principle of legality. Since crimes against humanity had never been applied before, criticisms of the *nullum crimen sine lege* principle were more easily refuted by being almost exclusively prosecuted in conjunction with war crimes, an already established international crime category.³³

The US Military Tribunals attempted to fill the gaps in the normative regulation. Most notably in the Justice case, the Tribunal required ‘proof of conscious participation in systematic government organised or approved procedures’ and thus excluded ‘isolated cases of atrocity or persecution’.³⁴ Ambos points out that this was the ‘beginning of a tendency in national and international practice to attempt to distinguish crimes against humanity from ordinary crimes by requiring – instead of the war nexus – a link to some kind of authority’.³⁵

Nevertheless, almost overnight, crimes against humanity became an established category of international criminal law. On 11 December 1946, the United Nations General Assembly unanimously reaffirmed the principles enshrined in the Statute and Judgment of the Nuremberg Tribunal as part of the *corpus* of international law, including the crime against humanity, in its Resolution 95 (I).³⁶ The requirement of accountability for crimes against humanity was also included in the peace treaties concluded with all defeated states.³⁷

33 However, the Nuremberg Tribunal did not consider the *nullum crimen sine lege* principle to be either a rule of common law or a general principle of law. The IMT stressed that *nullum crimen sine lege* is a principle of justice, which allows for the prosecution of acts not prohibited by law at the time they were committed, where it would have unjust consequences if such acts were to go unpunished. Nuremberg Trial Proceedings (30th vol.) 219. For more details on the prohibition of retroactivity, see Gallant, 2009.

34 Altstoetter and Others (Justice), TWC, Vol. III., 982.

35 Ambos, 2014.

36 See UN Doc. A/RES/1/95 (1946). The International Law Commission has also defined the so-called Nuremberg Principles in detail. See Principles of International Law recognised in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal Yearbook of the International Law Commission Vol. II. 1950. 374-378. A/CN.4/L.2. The category of crimes against humanity was later included in the 1951 Draft Code of Offenses against the Peace and Security of Mankind and in the 1954 Draft Code of Offenses against the Peace and Security of Mankind. Yearbook of the International Law Commission, Vol. II. (1951), 134; Yearbook of the International Law Commission, Vol. II. (1954), 151.

37 Hungary, for example, accepted this obligation in the Paris Peace Treaty.

“Hungary shall take all necessary steps to ensure the apprehension and surrender for trial of:

In 1948, the crime of genocide, which had been hitherto a part of crimes against humanity, became officially a separate international crime with the adoption of the Genocide Convention,³⁸ and in 1973, a specific crime against humanity, apartheid, was codified in a separate treaty.³⁹ In addition, there have been several criminal proceedings before national courts for crimes against humanity, in which the courts have attempted to clarify various elements of the offence on the basis of international law.⁴⁰ However, these trials were limited to crimes committed by nationals of the defeated states during the Second World War, so that, until the 1990s, the emergence of international criminal law seemed to be only an interlude in the development of international law.

Even though the International Law Commission (ILC) resumed international criminal law codificatory work in the early 1990s,⁴¹ it was the establishment of the International Criminal Tribunal for the Former Yugoslavia (ICTY)⁴² and the International Criminal Tribunal for Rwanda (ICTR)⁴³ that have breathed new life into international criminal law, and their jurisprudence have clarified some of the obscure elements of crimes against humanity. Article 5 of the ICTY Statute provides:

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

- (a) murder;
- (b) extermination;
- (c) enslavement;
- (d) deportation;
- (e) imprisonment;
- (f) torture;
- (g) rape;
- (h) persecutions on political, racial and religious grounds;
- (i) other inhumane acts.

(a) *Persons accused of having committed, ordered or abetted war crimes and crimes against peace or humanity*”

Act XVIII of 1947 on the ratification of the Peace Treaty signed in Paris on 10 February 1947.

38 Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, UNTS, vol. 78, 277. However, already in 1946, the UN General Assembly recognised that ‘genocide is a crime under international law’. UN General Assembly, The Crime of Genocide, 11 December 1946, UN Doc. A/RES/96.

39 *International Convention on the Suppression and Punishment of the Crime of Apartheid*, 30 November 1973, UNTS, vol. 1015, 243.

40 The most famous of these trials was the Eichmann case in 1961. See, for example, Schabas, W. A. 2013. For an account of national proceedings after World War II, see Bassiouni, M. C. 2011.

41 Draft Codes of Crimes against the Peace and Security of Mankind, Yearbook of the International Law Commission, Vol. II/2. (1991) 94.

42 UN Security Council, 25 May 1993, UN Doc. S/RES/827.

43 UN Security Council, 8 November 1994, UN Doc. S/RES/955.

Somewhat surprisingly, the ICTY Statute retained the armed conflict nexus inherited from the Nuremberg Statute, although it expanded its scope by encompassing non-international armed conflicts as well⁴⁴ and failed to elaborate the context of the commission of such acts. However, while Article 3 of the Statute of the Rwanda Tribunal lists the same prohibited acts, it defines the circumstances of the commission of crimes against humanity as ‘committed in the course of a widespread and systematic attack against a civilian population on national, political, ethnic, racial or religious grounds’ and also removes the armed conflict nexus requirement.⁴⁵

Overall, the jurisprudence of the two Tribunals have had a significant influence on the drafting of the Rome Statute establishing the International Criminal Court (ICC), and the Rome Statute’s definition of crimes against humanity has become the normative benchmark accepted by an overwhelming majority of the international community.⁴⁶

3. The Regulation of Crimes against Humanity in the Rome Statute of the International Criminal Court

The Rome Statute largely codified the judicial innovations of the jurisprudence of the *ad hoc* Tribunals, although, in certain respects, they departed from it and added the new underlying offences of the crime of apartheid and enforced disappearance of persons. Article 7(1) of the Statute provides:

For the purpose of this Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- 44 Nevertheless, in the Tadić case, the ICTY Appeals Chamber stated:
“It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict... customary international law may not require a connection between crimes against humanity and any conflict at all. Thus, by requiring that crimes against humanity be committed in either internal or international armed conflict, the Security Council may have defined the crime in Article 5 more narrowly than necessary under customary international law.”
 Prosecutor v. Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ICTY, Case No. IT-94-1-AR72, Appeals Chamber, 2 October 1995. para. 141.
- 45 However, notwithstanding the different crime definitions in the ICTY and ICTR statutes, the two Tribunals have sought to interpret crimes against humanity in a uniform manner in their jurisprudence.
- 46 There are currently 125 States Parties to the Rome Statute; however, the wide acceptance of the definition of crimes against humanity enshrined therein is demonstrated by the fact that even the Statute of the Special Court for Iraq, established with the assistance of the United States, adopted this definition. See Coalition Provisional Authority Order No. 48, CPA/ORD/9 Dec. 2003/48, “Statute of the Iraqi Special Tribunal Art 38”. International Legal Materials 2003. 231.

- (a) *Murder;*
- (b) *Extermination;*
- (c) *Enslavement;*
- (d) *Deportation or forcible transfer of population;*
- (e) *Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;*
- (f) *Torture;*
- (g) *Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;*
- (h) *Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;*
- (i) *Enforced disappearance of persons;*
- (j) *The crime of apartheid;*
- (k) *Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.*

The listed offences are further clarified in Article 7(2) and the *Elements of Crimes* that assist the ICC in interpreting the offences.⁴⁷

The Statute confirms that the concept of a crime against humanity is objectively defined as the commission of specific inhumane acts ‘as part of a widespread or systematic attack against a civilian population’. It follows that a crime against humanity can only be committed if the perpetrator’s serious violation is part of a broader series of acts. The term “widespread”, on the one hand, refers to the quantitative aspect of crimes against humanity, that is, it refers to a large number of inhumane acts,⁴⁸ although, in theory, it could be achieved by an event of outstanding gravity and with

47 The Elements of the Statute of Crimes is a document adopted by the ICC Assembly of States Parties by a two-thirds majority vote, and is an authentic interpretation of the provisions of the Statute. See Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3–10 September 2002 (United Nations Publication, Sales No. E.03.V.2 and corrigendum), Part II.B. The original document was amended by the States Parties at the Kampala Review Conference. See Official Records of the Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May–11 June 2010. International Criminal Court Publication, RC/11. See Statute, Article 9.

48 The ICC in the Bemba case stressed that the term “widespread” essentially refers to an attack that is ‘massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims’. However, this cannot be established solely on the basis of quantitative or geographical criteria, but only on the basis of a consideration of the individual facts. See Situation in the Central African Republic in the Case of the Prosecutor v. Jean-Pierre Bemba Gombo (Judgment) ICC, Trial Chamber III, Case No. ICC-01/05-01/08, 21 March 2016, para. 163. Cassese convincingly argues that although the early codifications of the crime against humanity did not include this clause, the concept was always based on the implicit assumption that it penalises an attack with grave consequences against a civilian population. Cassese et al. 2011.

many victims.⁴⁹ “Systematic”, on the other hand, is a qualitative adjective, requiring a high level of organisation of the commission of each act of violence, taking into account factors such as the continuous, repeated commission of crimes, planning, use of resources, or political motivation.⁵⁰

Based on a narrow reading, even the actions of serial killers could potentially fall into this category. However, this approach runs counter to the original concept of the intention of the Allied Powers, which clearly required some form of state intent behind international crimes.⁵¹ This is confirmed, *inter alia*, by the Justice case, in which the US Military Tribunal ruled that isolated atrocities, whether committed by a private individual or a governmental entity, must be excluded in the interpretation of crimes against humanity, since such crimes can only be committed within a framework systematically organised or approved by the government.⁵² In the Korbély case, the European Court of Human Rights also considered it important to examine whether the acts committed by the applicant in 1956 were part of state policy, as this constituted an element of the crime against humanity at the critical date.⁵³

The drafters of the Rome Statute took a similar position, thus Article 7(2)(a) states:

“Attack directed against any civilian population” means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.

However, the jurisprudence of the ICTY and ICTR has gone in the opposite direction. Since the Kunarac judgement, both *ad hoc* Tribunals have repeatedly rejected the notion that customary international law requires the existence of a state or organisational policy as an essential element of a crime against humanity.⁵⁴ However, there is general agreement that ‘the acts of the accused must comprise part of a pattern of widespread or systematic crimes directed against a civilian population and that the accused must have known that his acts fit into such a pattern’.⁵⁵

49 Prosecutor v. Blaškić (Judgment) ICTY, Trial Chamber I, Case No IT-94-15-T, 3 March 2000. para. 206; Prosecutor v. Kordić (Judgment) ICTR, Trial Chamber I, Case No IT-95-14/2-T, 26 February 2001. para. 176.

50 Cryer, 2010.

51 See Bassiouni, 2005.

52 Altstoetter and Others (Justice), TWC, Vol. III., 982.

53 Korbély case, para. 84.

54 Prosecutor v. Kunarac (Judgment) ICTY, Appeals Chamber, Case No IT-96-23&IT-96-23/1-A, 12 June 2002. See also, Prosecutor v. Krstić (Judgment) ICTY, Appeals Chamber, Case No IT-98-33-A, 19 April 2004. para. 225; Prosecutor v. Semanza (Judgment) ICTR, Appeals Chamber, Case No ICTR-97-20-A, 20 May 2005. para. 269; and the Cambodian Special Chambers, see Prosecutor v. Eav (Judgment) ECCC, Trial Chamber, Case No. 001/18-07-2007/ECCC/TC, 26 July 2010. para. 412.

55 Prosecutor v. Tadić (Judgment) ICTY, Appeals Chamber, Case No IT-94-1-A, 15 July 1999. para. 248.

Moreover, even if it is accepted that customary international law does not require a state or organisational policy to be followed,⁵⁶ it is undeniable that the ICC requires its existence as a jurisdictional requirement, so that it is certainly applicable in States Parties to the Statute.

The Statute does not precisely define the term “organisational policy”, that is, the organisation of actions coordinated by a non-state actor. The emerging jurisprudence of the ICC has not yet settled this question. However, the Pre-Trial Chamber has identified several guiding criteria in its decision on the assessment of the post-election unrest in Kenya. According to the Council, it is necessary to take into account the hierarchical structure of the group, whether it has a responsible leader; whether it is actually capable of carrying out an attack of sufficient gravity; whether it has control over a large area; whether its primary purpose is to carry out attacks against the civilian population; whether the group expresses its intention to carry out attacks against the civilian population; and whether the group is part of a larger group with the above characteristics.⁵⁷ The Chamber adopted a broad interpretation and found that the riots raised suspicions of crimes against humanity.⁵⁸

Despite the crime against humanity being an “attack against a civilian population”, international criminal law no longer requires as an element of the crime to be linked to an armed conflict, international or not. The term “attack” in the definition does not necessarily mean armed violence – although this is undoubtedly the case in the majority of cases – but ‘the commission of a series of prohibited acts against a civilian population’ within the meaning of Article 7(2) of the Statute that constitute severe human rights violations.⁵⁹ An inhumane act can be carried out without the use of armed force, such as the enactment of legislation that severely discriminates against certain ethnic or social groups.⁶⁰

56 There is considerable disagreement among legal scholars on this issue. See, for example, Schabas, 2008. Kress rightly points out that the presence of state and organisational policy in the Rome Statute may in itself be evidence that states regard it as a customary law requirement. Kress, 2010.

57 Situation in the Republic of Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation Into the Situation in the Republic of Kenya, ICC, Decision on the Confirmation of Charges, 31 March 2010, para. 90; The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Decision on the Confirmation of Charges Pursuant to Article 61(7) (a) and (b) of the Rome Statute, ICC, 23 January 2012.

58 Some authors support this approach, as it allows prosecuting criminal organisations such as transnational terrorist groups that may not be dealt with at the state level. See Di Filippo, 2008.; Halling, 2010.

59 Accordingly, the Elements of Crimes clearly state, ‘The acts need not constitute a military attack’. Elements of Crimes, Article 7.

60 The Akayesu judgment stated,

An attack may also be non-violent in nature, like imposing a system of apartheid, which is declared a crime against humanity in Article 1 of the Apartheid Convention of 1973, or exerting pressure on the population to act in a particular manner, may come under the purview of an attack, if orchestrated on a massive scale or in a systematic manner.

The Prosecutor v Jean-Paul Akayesu (Judgment), ICTR, Case No. ICTR-96-4-T, para. 581.

The ICC Statute also defined the concept of “other inhumane acts” more precisely than previous criminal fora. While the Yugoslavia Tribunal acknowledged that ‘there is a concern that this category lacks precision and is too general to provide a safe yardstick for the work of the Tribunal’,⁶¹ Article 7(1)(k) of the Statute provided that other inhumane acts are ‘acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health’.

Finally, it is important to stress that this category of offences only criminalises inhumane acts against civilians. Of course, if an attack against a civilian population also involves persons directly involved in an armed conflict, this does not change the qualification of the offence, provided that the attack is predominantly directed against the civilian population.⁶² The Yugoslavia and Rwanda Tribunals have previously interpreted the concept of a civilian population more broadly, finding in several decisions that it applies to anyone not actively participating in the armed conflict, including wounded, incapacitated, or captured combatants.⁶³ However, the ICTY later held in the *Martić*⁶⁴ and *Mrškić*⁶⁵ cases that where the victims are captured persons specifically selected on the basis of their combatant status, the acts constitute war crimes. Although this interpretation has been criticised in the literature,⁶⁶ it appears to be more in line with the original regulatory concept of crimes against humanity than the earlier expansive interpretation.

However, conduct committed in the presence of contextual elements can only lead to the accused being held liable if the act was committed intentionally and with knowledge of the context of the crime against humanity. However, it is not necessary to commit the offence with any discriminatory motive, except in the case of persecution, which may be committed solely on the basis of ‘political, racial, national, ethnic, cultural, religious, gender... or other grounds that are universally recognized as impermissible under international law’.⁶⁷

61 *Prosecutor v. Kupreškić et al.* (Judgment) ICTY, Trial Chamber, Case No. IT-95-16-T, para. 563

62 ICTY case law recognises that ‘it is clear that the targeted population must be of a predominantly civilian nature. The presence of certain non-civilians in their midst does not change the character of the population’. See *Tadić*, Trial Chamber, 1997, para. 638; *Kordić*, Trial Chamber, 2001, para. 180.

63 See, *inter alia*, *Akayesu*, para. 582; *Tadić*, Trial Chamber 1997, para. 643; *Prosecutor v. Kordić and Čerkez* (Judgment) ICTY, Appeals Chamber, Case No. IT-95-14/2-A, 17 December 2004.

64 *Prosecutor v. Martić* (Judgment) ICTY, Trial Chamber, Case No. IT-95-11-T, 12 June 2007.

65 *Prosecutor v. Mrškić* (Judgment) ICTY, Trial Chamber, Case No. IT-95-13/1-T, 27 September 2007, para. 476–480.

66 Singh, 2009.

67 Rome Statute, Article 7(1)(h).

4. Conclusion

The category of crimes against humanity emerged as a revolutionary innovation after the Second World War, but it quickly became a fundamental part of international criminal law; however, it is still not adequately codified, which raises questions about its practical application, particularly in domestic legal systems. Even though the Rome Statute of the ICC provides a regulation of crimes against humanity, the international community has failed to adopt a comprehensive convention and apart from the Apartheid Convention; only the convention on the crime of enforced disappearance was adopted.⁶⁸

In 2010, a convention on crimes against humanity was drafted on the initiative of the international criminal law profession, with the participation of nearly 250 international criminal law experts; however, it was not adopted by the international community.⁶⁹ Recently, in 2019, the International Law Commission adopted the Draft Articles on Prevention and Punishment of Crimes Against Humanity,⁷⁰ which were approved by the Sixth Committee of the UN General Assembly in 22 November 2024.⁷¹ In the same year, The Ljubljana–The Hague Convention was opened for signature to enhance international cooperation concerning the investigation and prosecution of genocide, crimes against humanity, war crimes, and other international crimes.⁷² Since both the ILC Draft Articles and the Hague-Ljubljana Convention reproduced the definition codified in the ICC Statute, it seems that the Rome Statute's definition of crimes against humanity is slowly being accepted universally.⁷³

Even so, some unresolved issues remain concerning the interpretation and application of this category of international crimes. There is still uncertainty about the existence of a state or organisational policy requirement. Furthermore, there are still debates about whether the civilian population requirement should be retained. Most importantly, the question, 'What is the potential scope of "other inhumane acts"?' still requires an answer. The latter seems to be a particularly important issue as invoking the general principle of humanity could potentially justify a very broad interpretation. For instance, some authors suggest that even the crime of aggression could be prosecuted as "other inhumane act", since an illegal use of force inevitably causes suffering to the civilian population, and this interpretation could help circumvent

68 International Convention for the Protection of All Persons from Enforced Disappearance, UNTS. vol. 2716, 3., opened for signature 6 February 2007, entry into force 23 December 2010.

69 For details, see Sadat, 2011.

70 UN Doc. A/74/10 (2019). Yearbook of the International Law Commission, 2019, Vol. II., Part Two.

71 UN Doc. GA/L/3738 (2024).

72 2023. The Ljubljana – The Hague Convention on International Cooperation in the Investigation and Prosecution of Genocide, Crimes against Humanity, War Crimes and other International Crimes, Ljubljana, 26 May 2023.

73 It should be noted that the Iraqi High Tribunal – also translated as Supreme Iraqi Criminal Tribunal, Iraqi Higher Criminal Court, or Iraqi Special Tribunal – that was created under the guidance of the United States, also adopted the Rome Statute definition. Art. 12, Law No. (10) 2005 on the Supreme Iraqi Criminal Tribunal.

the jurisdictional constraints of the Rome Statute; thus remedying the accountability gap. Correspondingly, Benjamin Ferencz has argued that ‘national leaders suspected of planning or committing the crime of aggression may simultaneously be charged with Crimes against Humanity and War Crimes – which carry the same maximum sentence as aggression’.⁷⁴ While there is no sign that this interpretation enjoys significant state support, it shows the transformative potential of this category.

Overall, the concept of crimes against humanity has undergone a remarkable evolution over the last 100 years. From its early invocation as a protest against mass atrocities, it has become one of the cornerstones of the normative framework of international criminal justice and by preserving its fundamental characteristic to appeal to our moral sensitivities, it is capable of addressing future injustices.

74 Ferencz, 2009.; Mégret, 2023.

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CHAPTER 9

EFFECTS OF WAR CRIMES IN THE ROME STATUTE ON NATIONAL SYSTEMS OF PROSECUTION WITH PARTICULAR EMPHASIS ON UNIVERSAL JURISDICTION



RÉKA VARGA

Abstract

This chapter explores the interplay between the International Criminal Court (ICC) and domestic legal systems, focusing on how war crimes provisions influence national prosecution efforts. Emphasizing the ICC's principle of complementarity, the analysis highlights both the legal obligations and the practical challenges faced by national courts in prosecuting core international crimes. It demonstrates the critical importance of adequate domestic legislation and judicial capacity, particularly in systems where the direct application of international law remains limited or ambiguous. The study addresses difficulties in implementing treaty and customary international law, revealing gaps in national legal frameworks and judicial preparedness. A special focus is given to the re-emergence of universal jurisdiction, particularly in light of the Russian-Ukrainian conflict. The chapter discusses Ukraine's partial incorporation in its legislation of the Rome Statute's definitions and the efforts of European and overseas states in initiating war crimes investigations based on universal or extraterritorial jurisdiction. These developments illustrate both the promise and the complexity of international criminal justice when national systems are tasked with upholding global norms. The chapter concludes by reaffirming the

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vital role of national courts in closing the impunity gap and stresses that the ICC's success depends largely on states fulfilling their responsibility to prosecute war crimes effectively, guided by international legal standards and supported through coordinated global efforts.

Keywords: International Criminal Justice, War Crimes Prosecution, Domestic Courts, Russian-Ukrainian Conflict, Universal Jurisdiction

1. Introduction

As the International Criminal Court's (ICC) first president, Philippe Kirsch, said, the Court would be truly successful if no case were brought before it, as this would mean either that international crimes are not committed anymore or that states are able and willing to investigate them.¹ The ICC stands as a significant milestone in the broader international project aimed at establishing global justice and enhancing accountability for international crimes.² However, inherent challenges arise from the interplay between the ICC, its complementary principle and the complexities of national lawmaking. The interplay between the Court's jurisdiction and the complementarity principle, which emphasises the primacy of national legal systems in prosecuting international crimes, introduces complexities that reflect the potential tensions between international and domestic legal frameworks. Notwithstanding these challenges, we must underline the pivotal role of national courts in investigating and prosecuting core international crimes, with the ICC serving as a potential jurisdictional authority if states fall short in fulfilling their prosecutorial duties.

This chapter assesses the effects of war crimes in the Rome Statute on the readiness of domestic courts to handle war crimes cases, highlighting the limited number of national procedures and the complexities associated with prosecuting such crimes. This is then followed by a discussion on the re-emergence of universal jurisdiction, a vital tool in the context of the Russian-Ukrainian conflict, which, by complementing the efforts of the ICC, is starting to take centre stage in Europe and overseas.

1 Kardos and Lattmann, 2013, p. 377.

2 Reynolds and Xavier, 2016, p. 960.

2. Effects of international law on national lawmaking and national jurisprudence: the ICC complementarity principle

The Rome Statute of the ICC and its complementarity provision³ illustrate potential challenges arising from disparities between international and national law-making. States are obligated to enact legislation enabling their courts to prosecute war crimes, aligning with the Geneva Conventions and Additional Protocol I. The Rome Statute's complementarity provision emphasises the significance of national courts' actual investigations and prosecutions,⁴ with the ICC potentially assuming jurisdiction if a state fails to or does not prosecute.⁵ Unlike the Geneva Conventions, which lack a clear standard for implementation and offer no direct consequence for non-compliance,⁶ the Rome Statute establishes a tangible effect: the ICC can take over a case if a state neglects its prosecutorial obligations.⁷ In fact, the complementarity principle was one of the main reasons why states examined whether their national laws were adequate to apply international criminal law.⁸ The interplay between the Geneva Convention's obligation and the Rome Statute's complementarity provision highlights a complementary relationship, with the latter reinforcing the former's weight.⁹

Although the "threat" that the ICC complementary principle encourages jurisdictional states to proceed was seen as one of the great achievements of the Rome Statute,¹⁰ the ICC is not intended as an appellate court freely taking cases from national courts.¹¹ While the criteria of inability and unwillingness make sense in many cases, they should not be and are not wielded as a freely usable discretionary tool by the ICC. Fundamental differences exist between the ICC's complementarity approach and the jurisdictional primacy of the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR). The ICC aims to refrain from

3 ICC Rome Statute, Article 17: '1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; (...)'.

4 Holmes, 2002, p. 668.

5 Bárd, 2003, p. 320 ff.

6 Varga, R., 2007.

7 Robinson, 2010, p. 25, and Varga, R., 2006, pp. 95-98.

8 Bárd, 2003, p. 320 ff.

9 Varga, R., 2014, pp. 81-82.

10 Robinson, 2010, p. 25, and Varga R., 2006, pp. 95-98.

11 Van der Wilt, 2008, p. 232. and p. 257: 'The International Criminal Court is not expected to repair unfair trials, as it is not meant to be a human rights court, nor is it in a position to mitigate or aggravate sentences, imposed by domestic courts'. Also see Holmes, 2002, p. 673, and Varga, R., 2014, p. 83.

extensive scrutiny of domestic proceedings, limiting itself to fundamental questions rather than engaging in detailed revision.¹²

3. Can international law really be directly applicable?

3.1. *Treaty law*

Adequate national implementation of core international crimes is thus a prerequisite of domestic procedures. The primary reason given when states refuse to implement international humanitarian law treaties is the argument that, based on states' constitutions, international law automatically becomes part of domestic law upon promulgation (dualist systems) or publication (monist systems). However, this provision often fails to address challenges faced by states in applying humanitarian law treaties because in numerous instances, there is no clear-cut distinction between monist and dualist approaches, but rather a combination of both.¹³ Furthermore, direct application of international law by national judges may cause problems. When a state becomes party to a treaty without adopting implementing legislation, the promulgation alone may not be enough for judges to try someone for war crimes directly based on these treaties.¹⁴ This chapter interprets direct applicability as requiring the application of international law, that is, the promulgated treaty. Consequently, if the treaty rules are not implemented into existing internal norms (e.g., the Criminal Code), judges may have to apply the Geneva Conventions/Additional Protocols directly, creating complexity due to constitutional issues and the differences between international and national law systems.¹⁵

12 Holmes, 2002, p. 668.

13 The constitutions of Bosnia-Herzegovina, Estonia and Hungary recognise general principles of international law. The constitutions of Macedonia, Poland, Slovakia and Slovenia say that self-executing treaties are directly applicable. The Croatian, Lithuania, Estonian and Slovak systems (although the Slovak Constitution mentions promulgation of international treaties, many Slovak authors argue that the Slovak system is monist) seem to be monist or have monist elements in their constitutions. The Bulgarian, Czech, Hungarian and Polish constitutions are dualist or have dualist elements: the Bulgarian Constitution says that ratified, promulgated and in-force treaties are part of national law, the Czech Constitution refers to promulgated treaties, and the Hungarian and Polish constitutions mention publication of international treaties. See Varga, R., 2014, p. 81.

14 By "direct application of international law by domestic courts", the present study means application by domestic courts of rules of international treaties that were ratified by the given state but whose provisions had not been implemented into national law. For instance, applying a grave breach of the Geneva Conventions in a criminal procedure in a state that had ratified the Geneva Conventions but had not implemented that specific grave breach into its penal code. Similarly, direct application could also mean an application of a customary rule without its having been implemented into national legislation. See Varga, R., 2014, p. 118.

15 Kis and Gellér, 2005, p. 364. Also see Varga, R., 2014, p. 119 and the ministerial explanation to the

International law often lacks the detailed regulations needed for effective judicial application,¹⁶ leading to questions about references for elements of crimes, sanctions and consideration of international case law and customary law. Depending on the state's legal system, judges may either successfully address these issues through direct application or struggle due to unclear domestic legislation, potentially leading to very lengthy procedures or charges being dropped. If a state adopts inadequate implementing legislation, it may face challenges enforcing international treaties, raising questions about breaches of international obligations.¹⁷ Degan notes that a national judge cannot give direct effect to international obligations unless authorised by national law.¹⁸ The level of authorisation depends on both national legislation and judges' willingness to apply international law. In theory, if international law is part of the national legal order, it becomes directly applicable, but challenges arise when elements necessary for adjudication are drawn from non-treaty sources. For instance, the Elements of Crimes in the ICC Rome Statute, though not binding, serve as interpretative aids during ICC proceedings¹⁹ and could guide national courts.²⁰

3.2. Customary law

The issue of directly applying international law becomes more intricate with customary law, especially in cases of universal jurisdiction where in many cases the jurisdictional base is founded on customary international law. Degan notes that, without national authorisation, the *nullum crimen sine lege* principle hinders judges from implementing the *aut dedere aut judicare* principle based on customary international law or treaties. A potential solution lies in the transformation of accepted customary law into the national legal framework, as exemplified in the Hungarian Fundamental Law that accepts generally recognised rules of international law as part of the national legal order.²¹ While debate exists about whether this includes *ius cogens* or customary international law, such a transformation could facilitate judges' application of unwritten, binding international law.²² Even in cases where a state transforms customary law into its national legal order, the question of adequate implementation measures is relevant.

Certain states find customary law elusive and vague, or even controversial: the Dutch Supreme Court in the *Bouterse* case²³ rejected reliance on customary law

German Völkerstrafgesetzbuch.

16 As for collision of direct application of the Rome Statute with the principle of legality, see Cottier, 2005, p. 4.

17 Wiener, 1995, p. 203.

18 Degan, 2005, p. 212.

19 Dörmann, 2003, p. 8.

20 Varga R., 2014, pp. 119–121.

21 The Fundamental Law of Hungary, 25 April 2011, Article Q para 3.

22 Varga R., 2014, pp. 122–123.

23 Supreme Court of the Netherlands, nr. HR 00749/01 CW 2323 LJN: AB1471, NJ 2002, 559.

conflicting with national law. Van der Wilt acknowledges the lack of precision in rules of international customary law but argues that if certain standards, like the prohibition of torture as *ius cogens*, require states to prosecute perpetrators, domestic legal impediments may not excuse neglecting such obligations.²⁴

The elusiveness of customary law should not impede its application, given its equal binding status with treaty law. The identification of whether a norm is customary and consequently its enforcement lies – among others – with the state, and while it may be unrealistic for the legislature to systematically implement customary law, judges bear the responsibility to determine its customary nature. The elusiveness of customary law warrants cautious determinations by judges, favouring a restrictive rather than a broad approach.²⁵

3.3. Are domestic courts really ready to try war crimes cases?

The limited number of national procedures hampers the effective prosecution of serious war crimes, necessitating collaboration between national authorities, the international community, and the ICC to avoid an “impunity gap”.²⁶ Several factors contribute to the practical challenges in prosecuting war crimes. First, war crimes are typically interconnected, resulting in multiple accused and numerous cases to be tried.²⁷ Second, the processes for handling war crimes require expert understanding of international law, legal precedents, and the application of domestic law with a view to international law. Accessing primary and secondary sources can often be challenging due to physical unavailability or language barriers, despite the Internet. Third, war crimes procedures are often costly and time intensive. The geographical and temporal distance between the crime scene and the trial location makes evidence retrieval difficult, witnesses may be distant and speak different languages, and cooperation with other states’ authorities is crucial, making proceedings dependent on the cooperation of the state where the crimes occurred. These complexities may contribute to judges’ hesitancy in handling war crime cases.²⁸

Although prosecutors and judges technically apply national law during procedures due to the promulgation of international treaties, they require specialised knowledge of international law. Merely navigating relevant international treaties is insufficient; familiarity with the literature, international jurisprudence, and related international norms is essential for effective handling of war crimes cases.²⁹

Furthermore, trying war crime cases is not necessarily a career motivator for judges. The legal intricacies and lengthy procedures may not contribute significantly to judges’ career statistics.

24 Comment by Harmen van der Wilt, Bouterse-case, ILDC 80 (NL 2001), C5.

25 Varga R., 2014, p. 123.

26 Kirs, 2012, p. 19. Also see ICC, 2003, p. 3.

27 Kirs, 2012, p. 19. Also see Kirs, 2008, p. 31.

28 Varga R., 2014, pp. 158–159.

29 Mettraux, 2006, p. 371.

Another factor is that political considerations often come into play when dealing with one's own nationals or nationals of powerful nations, leading to potential dropping of charges or attempts to exclude the criminality of the accused.³⁰ A comparative analysis of national judges' behaviour reveals reluctance to apply international law when perceived as injuring national interests.³¹ Recognising the problem of the independence of national courts when dealing with international law, the Institute of International Law in its document emphasised maintaining their independence. Prosecutors and judges play crucial roles, impacting the success of national processes³² as they hinge on their decisions. Prosecutors may opt to drop charges citing a purported lack of jurisdiction, denying the international law character of the crime or attempting extradition rather than pursuing domestic prosecution. Judges, on the other hand, may adopt a restrictive interpretation of jurisdictional issues or apply ordinary crimes instead of recognising the international nature of the offence.³³

Some states address these challenges by hiring experts and systematically collecting materials on international law. Unfortunately, Central European countries often lack such measures, leaving prosecutors and judges to navigate these difficulties themselves. While states may attribute the lack of judicial preparedness to judicial independence, it is essential for states to intervene and provide training, funds and a motivating environment for judges. This emphasises the state's responsibility to ensure effective prosecution of grave breaches, as mandated by international law. Judges' reluctance to apply international law directly due to perceived distance and lack of influence underscores the significance of national jurisprudence in the formation of customary law.³⁴ Courts applying international law contribute to a dialogue on experiences and lessons learned, enhancing mutual efforts. For effective implementation, courts must interpret national law in alignment with international law, following the principle of consistent interpretation.³⁵ The Hungarian Constitutional Court emphasised this in 1993, stating that the constitution and domestic law should be construed to give effect to generally recognised international rules.³⁶ Judges need an awareness of international law for this rule to be effective.

30 Ferdinandusse, 2006, pp. 89–98.

31 Benvenisti, 1993, cited in Benvenisti, 1994, p. 424. and see Varga, Cs., 2009, pp. 148–150.

32 Institute of International Law, 1993.

33 This is exactly what happened in Hungary in the *Biszku* case, where the Prosecution did not bring charges, arguing that the acts in question did not constitute crimes against humanity and that prosecution was therefore time-barred. Remarkably, the prosecution did not explain why it had come to the conclusion that the acts were not crimes against humanity, it simply stated so. See Municipal Prosecutor's Office, NF 27942/2010/1 and Public Prosecutor's Office, NF. 10718/2010/5-I. For an analysis see Varga R., 2011.

34 ICTY, Trial Chamber, *Tadić*, 7 May 1997, para 642, refers to the judgement of the French Cour de Cassation in the *Barbie* case, and ICTY, Trial Chamber, *Furundžija*, 10 December 1998, para 194, refers to British military courts. See Ferdinandusse, 2006, p. 111.

35 Ferdinandusse, 2006, pp. 146–153.

36 Hungarian Constitutional Court, Decision 53/1993 (13 October 1993). For a critical analysis, see Ádány and Varga, R., 2021.

Furthermore, legal correctness is just one facet of international criminal proceedings. Criminal judges must also exhibit cultural openness to assess perpetrators and victims fairly in cases stemming from cultural conflicts.³⁷ While the insertion of the *aut dedere aut judicare* principle in treaties reflects the international community's belief in states' capability to address international crimes exercising universal jurisdiction,³⁸ it remains crucial to assess whether those applying the law possess the necessary knowledge, experience and language skills for effective war crimes procedures. The availability of literature and legal commentaries in languages foreign to prosecutors and judges is a vital consideration for effective application.

All states must comply to end impunity, signalling a commitment to the universally accepted belief that war crimes violate fundamental principles. Establishing a capable system to prosecute war criminals is a crucial step in this regard.³⁹

4. Case study: the “renaissance” of war crimes procedures and universal jurisdiction in the context of the Russian-Ukrainian conflict

The relevance of establishing mechanisms ensuring the effective prosecution of war crimes was already often questioned in peacetime. However, due to the sudden turn of events in February 2022, the importance of the principle regained its priority. The war in Ukraine has reinvigorated international efforts towards criminal justice.

Not being party to the Rome Statute itself, Ukraine has consented to the ICC's investigating the situation within the country for crimes under the jurisdiction of the ICC allegedly committed on its territory. In 2014 and 2015, Ukraine submitted a declaration recognising the Court's jurisdiction to identify war crimes and crimes against humanity committed within its territory starting from 21 November 2013, to prosecute suspects, and to conduct proceedings. Furthermore, Ukraine committed to collaborating with the ICC throughout the entirety of the proceedings.⁴⁰

Following the referral of 43 states parties, which served as the trigger for the procedure, the ICC opened an investigation in the territory of Ukraine in March 2022 over war crimes, crimes against humanity and genocide. Aggression does not fall under the jurisdiction of the ICC in this case, as the ICC has jurisdiction over this crime only with respect to states parties to the Rome Statute. In March 2023, the ICC issued an arrest warrant against Vladimir Vladimirovich Putin, President

37 Höfe, 1998, p. 216.

38 Ryngaert, 2006, p. 53.

39 Varga, R., 2014, pp. 163–164.

40 Varga, R., 2022.

of the Russian Federation, and Maria Alekseyevna Lvova-Belova, Commissioner for Children's Rights in the Office of the President of the Russian Federation, in response to the forcible transfer of Ukrainian children to Russian territory.⁴¹ The ICC's specific mandate and limitations – having no enforcement powers of its own – advocates for enhanced cooperation between the Court and states.

However, as stated above, the ICC is not expected to try a large number of cases. It serves as a fallback option, in case other jurisdictions are not exercised, following from the so-called complementarity principle, according to which the ICC will only have jurisdiction if the concerned state is unwilling or unable to carry out a procedure.⁴² Hence, states have the primary responsibility to try core international crimes. Jurisdictions exercised by states may be founded on a general jurisdictional basis (national, territorial or passive national bases) or universal jurisdiction. During or after armed conflicts, the state(s) with general jurisdictional basis are often either not in a position to carry out procedures, do not want to carry them out or do so only in respect of the nationals of the “enemy”. Universal jurisdiction is thus a crucial tool in the fight against impunity and is complemented by the ICC in addressing crimes against humanity, genocide and war crimes.⁴³

In a noteworthy response to the heinous acts committed, several countries throughout Europe and overseas initiated investigations at the national level into international crimes carried out in Ukraine based on universal or extraterritorial jurisdiction.⁴⁴ Above all, however, it is Ukraine's and Russia's primary responsibility to ensure that there are domestic prosecutions for war crimes.

4.1. Procedures in Ukraine

More than one year after the outbreak of the war in Ukraine, the Office of the Prosecutor General of Ukraine had documented around 108,904 incidents of potential war crimes as of 29 September 2023.⁴⁵ Additionally, Ukrainian Prosecutor General Andriy Kostin stated that up until 16 July 2023, Ukrainian courts had already successfully convicted more than 50 Russian nationals for their involvement in war crimes.⁴⁶ Although Ukraine did incorporate universal jurisdiction and the definition of war crimes, crimes against humanity, genocide and torture into its Criminal Code,⁴⁷ it does not cover all of them.

Part 1 Article 8 of the Ukrainian Criminal Code states that ‘foreign nationals or stateless persons not residing permanently in Ukraine, who have committed criminal

41 International Criminal Court. (n.d.). Situation in Ukraine, see also: Congressional Research Service, 2023, pp. 1–2.

42 Articles 1 and 17, Rome Statute.

43 Paulet, 2017.

44 TRIAL International, 2023, p. 10.

45 Congressional Research Service, 2023, Summary.

46 RFE/RL's Ukrainian Service, 2023.

47 Amnesty International, 2012, p. 21.

offences outside Ukraine, shall be criminally liable in Ukraine under this Code in such cases as provided for by the international treaties, or if they have committed any of the grave or special grave offences against rights and freedoms of Ukrainian citizens or Ukraine as prescribed by this Code'.⁴⁸ The Criminal Code takes into consideration first and foremost the grave breaches defined by the four Geneva Conventions and its Additional Protocols, the corner stone(s) of international humanitarian law. However, not all war crimes are listed in the Geneva Conventions and the Additional Protocols. The war crime definitions of the Criminal Code are narrower than those of the Rome Statute – which is logical, given that Ukraine is not a party to the Rome Statute. Currently, based on its Criminal Code, Ukraine has the authority to pursue legal action against war crimes such as wilful killing, torture or inhuman treatment, wilfully causing great suffering or serious injury to body or health, unlawful deportation and taking of hostages. Many actions, including using people as human shields, sexual violence committed in armed conflict, crimes against cultural objects, and crimes against humanitarian missions – like shelling evacuation buses – are not criminalised by the Criminal Code.

In addition, the application of universal jurisdiction for war crimes is feasible only when the individuals involved are present on Ukrainian territory. This implies that Ukraine can initiate criminal proceedings against foreigners or stateless individuals only when they are present within its borders.⁴⁹ While this approach enhances the efficiency of the principle, there is a drawback. Generally, there is a lapse of time between the commencement of the investigation and the formal declaration of an individual as suspected of committing a crime. During this period, the suspect has the opportunity to leave Ukraine's territory.⁵⁰ Should this happen and perpetrators escape and settle elsewhere, according to Amnesty International's 2012 survey on universal jurisdiction, more than 80% of the 193 UN states can 'exercise universal jurisdiction over one or more crimes under international law, either as such crimes or as ordinary crimes under national law'.⁵¹ The urge to avoid any "impunity gap" prompted states worldwide to collectively act against grave atrocities, each according to its own capacity.

4.2. Procedures in Europe and overseas

From the onset of Russia's invasion of Ukraine in February 2022, several Central European states have initiated multiple criminal investigations focusing on war crimes, crimes against humanity and aggression. Germany, Sweden, Spain and

48 Official Translation of the Criminal Code of Ukraine, 2021, Part 8. Article 1. See also Institute for War & Peace Reporting, 2022.

49 Institute for War & Peace Reporting, 2022.

50 Ibid.

51 Amnesty International, 2012, p. 2.

Switzerland, as well as Canada, have also initiated investigations within their respective national justice systems.⁵²

4.2.1. Europe

In recent years, there has been a resurgence of interest in universal jurisdiction, particularly in Europe. In 2022, a former Iranian prosecutor was put on trial in Sweden and found guilty of war crimes committed in 1988. In the same year, a breakthrough occurred in the Laurent Bucyibaruta case as a former Rwandan prefect was sentenced in France for his involvement in the 1994 genocide. Furthermore, in the Netherlands, a former Kabul prison commander was convicted of war crimes perpetrated in Afghanistan in the 1980s, and a sentence of life imprisonment for a former Ethiopian official implicated in war crimes during the late 1970s was affirmed by the Hague Court of Appeal.⁵³ Germany, France and Sweden, for instance, have also developed a quite extraordinary expertise in investigating international crimes in connection with the Syrian armed conflict. These countries launched “structural investigations” through specialised war crimes units dedicated to gathering evidence. Therefore, with the ongoing war in Ukraine, all this experience and knowledge are made very good use of since public prosecutors across Europe and Canada have initiated structural investigations. Although these specific procedures do not target individuals or incidents from the outset, but focus on the collection of evidence, it is crucial to proactively build cases for future criminal proceedings.⁵⁴

Moreover, countries lacking experience in investigating international crimes have also initiated legal proceedings in response to the conflict in Ukraine. Poland, Romania, Slovakia and Latvia, due to the enormous and constant waves of Ukrainian refugees fleeing the war zone, started recording testimonies to safeguard essential evidence for potential future cases. However, this multifaceted initiative also has its drawbacks. It could cause duplication or over- documentation of the cases as well as re-traumatising victims.

Therefore, there was a need to harmonise these efforts and establish a unified, properly coordinated investigation team. The Joint Investigation Team (JIT) was established by Lithuania, Poland and Ukraine with the support of the European Union Agency for Criminal Justice Cooperation (Eurojust), and it now includes seven European countries, the European Union Agency for Law Enforcement Cooperation (Europol) and the ICC.⁵⁵ This initiative is also fostered by the work of the United Nations Independent International Commission of Inquiry for Ukraine. The Commission’s findings are shared with both the JIT and the ICC separately.⁵⁶

52 Congressional Research Service, 2023, p. 15.

53 TRIAL International, 2023, pp. 10–11.

54 Ibid.

55 Ibid. See also Eurojust, 2023.

56 Van den Berg and Deutsch, 2023. See also Varga, R. and Újvári, 2023, pp. 50–51.

4.2.2 *Canada and the United States*

Canada plays a fundamental role in the investigation into alleged war crimes in Ukraine. Canada was the first nation to integrate the crimes defined in the Rome Statute into its domestic laws through the Crimes Against Humanity and War Crimes Act (CAHWCA) in 2000. The CAHWCA officially criminalises genocide, crimes against humanity and war crimes based on international law, including the Rome Statute. By defining these offences in Canadian law, Canada can utilise the complementarity provisions of the Rome Statute. In addition, the legislation incorporates universal jurisdiction, allowing Canada to prosecute individuals within its borders for crimes outlined in the CAHWCA, irrespective of their nationality or the location of the crimes.⁵⁷

In March 2022, Canada was among those 43 states that referred the situation in Ukraine to the ICC, coinciding with the Royal Canadian Mounted Police (RCMP) launching the first real-time war crimes investigation in Canada's history. Ukrainian Canadians actively contribute by collecting war crimes testimonials to potentially prosecute war crimes in Ukraine. Despite the geopolitical complexities, the RCMP investigation remains crucial for victims.⁵⁸

The United States (not a party to the Rome Statute) is now initiating prosecutions focusing on Russian nationals involved in committing war crimes during the conflict in Ukraine. U.S. law made war crimes punishable under federal criminal law but limited its national courts' jurisdiction to active and passive personality jurisdiction.⁵⁹ The indictment details the actions of four defendants, all identified as members of the Russian military or Donetsk People's Republic, who allegedly abducted and mistreated a U.S. civilian, in violation of the Geneva Convention. The charges, under the U.S. War Crimes Act of 1996, include unlawful confinement, torture, inhuman treatment and criminal conspiracy. The conspiracy charge, unusual in international law, is brought under the U.S. statute. The indictment, though a significant move towards accountability, faces challenges due to the defendants' absence and difficulties in gathering evidence from an active war zone. The indictment is intended to expose Russia's conduct and could affect the defendants' future international travels.⁶⁰

Furthermore, a proposal aiming to broaden the jurisdiction of U.S. courts over war crimes by including individuals 'present in the United States, regardless of the nationality of the victim or offender' was approved and enacted into law in January 2023. This modification enables U.S. prosecutors to file charges against foreign nationals, extending to those accused of war crimes in the ongoing conflict occurring after the enactment of the legislation.⁶¹ While the recent legislative changes to the

⁵⁷ Government of Canada, 2023.

⁵⁸ Banerjee and Levin, 2023.

⁵⁹ Congressional Research Service, 2023, p. 24.

⁶⁰ Anderson and Orpett, 2023.

⁶¹ Congressional Research Service, 2023, p. 24.

U.S. war crimes statute fall short of granting full universal jurisdiction, they extend jurisdiction based on presence in U.S. territory. This expansion facilitates the Justice Department's prosecution in cases where it is well-equipped to investigate and bring charges.⁶²

5. Conclusion

The complicated interplay between the ICC Rome Statute and national criminal legislation boosts national prosecutions and also has a triggering effect on the application of universal jurisdiction. These also underscore both the challenges and the opportunities in addressing war crimes.

In the face of the ongoing armed conflicts, it is crucial for nations to address gaps in legislation, enhance judicial preparedness, and foster international cooperation. The effective prosecution of war crimes demands a comprehensive approach that aligns national laws with international standards, navigates challenges in applying international law directly and makes use of universal jurisdiction to ensure justice prevails in even the most complex situations.

Coming back to Philippe Kirsch's statement, cited at the beginning of this chapter, the ICC's success is not necessarily measured in the number of procedures the ICC itself carries out, but in the extent to which states are taking on their responsibility to punish perpetrators.

62 Anderson and Orpett, 2023.

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ONE STEP FORWARD, ONE STEP BACK? THE CRIME OF AGGRESSION UNDER THE ROME STATUTE



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Abstract

By activating the Kampala Amendments to the Rome Statute, for the first time since the Nuremberg and Tokyo trials after the Second World War, the International Criminal Court (ICC) has jurisdiction over crime of aggression. This is one giant leap for mankind; nevertheless, the international community will likely have to wait a long time to witness a criminal procedure before the ICC initiated for the crime of aggression. This is because it is not the complete disappearance of the breaching of the rules of *jus contra bellum*, but the complex and almost inapplicable set of rules on the crime of aggression. To see these obstacles clearly, this article seeks to provide a concise analysis of the definition of the crime of aggression (“substantial aspects”) and the exercise of jurisdiction over the crime of aggression (“procedural aspects”) in accordance with the respective provisions of the Rome Statute.

Keywords: international criminal law, Rome Statute, International Criminal Court, Kampala Amendments, the crime of aggression

‘[T]he supreme international crime, differing only from other war crimes in that it contains within itself the accumulated evil of the whole’.¹

- 1 Judgment of the International Military Tribunal at Nuremberg, 22 Trial of the Major War Criminals before the International Military Tribunal 421 (1948).

Nóra Béres (2025) ‘One Step Forward, One Step Back? The Crime of Aggression under the Rome Statute The Crime of Aggression under the Rome Statute’. In: Nóra Béres (ed.) *The ICC at 25: Lessons Learnt*, pp. 213–236. Miskolc–Budapest, Central European Academic Publishing.

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1. Introduction

Although the maintenance of international peace and security, including the prevention of acts of aggression, is the ultimate purpose of the United Nations,² and *jus contra bellum* is a well-established element of the set of imperative norms of international law, scholarly discussions on war and aggression are, unfortunately, still relevant, even in the 21st century. When stocktaking recent events, examples of breaching peace and security easily come to mind: on 24 February 2022, the Russian Federation initiated a complex and enduring war of aggression against Ukraine, and on 13 April 2024, Iran launched several kamikaze drones, cruise missiles, and ballistic missiles against Israel. These instances are only the tip of the iceberg. Despite the comprehensive and unambiguous prohibition of the unlawful use of force, acts of aggression and wars are ongoing at this very moment.

Responsibility for aggression is a “late child” of international law, and the responsibility of States and of individuals should be distinguished. Today, only one international court is competent to handle individual criminal responsibility for aggression: the International Criminal Court (ICC), which has had jurisdiction over the crime of aggression since 17 July 2018. Thus, reflecting on the 25th anniversary of the adoption of the Rome Statute of the ICC (hereinafter, the Rome Statute),³ this study focuses on individual criminal responsibility, presents a brief historical overview of the development of the concept of aggression, then analyses the definition of the crime of aggression. Within the framework of this analysis, this study examines the substantive aspects of the core crime, then discusses jurisdictional aspects. When exploring the elements and jurisdictional circumstances of the crime of aggression, one should primarily lean on the textual analysis of the respective provisions of the Rome Statute as a research methodology, since, apart from the judgements on the crime against peace by the International Military Tribunal at Nuremberg (hereinafter, Nuremberg IMT) and the International Military Tribunal for the Far East (hereinafter, Tokyo IMT), no case law exists in connection with the crime of aggression. The hypothesis of this study departs from the historical significance of establishing individual criminal responsibility for aggression and making it possible to bring perpetrators to justice, while presupposing that, due to the complex jurisdictional regime set up by the Rome Statute, holding someone responsible for committing such a grave crime remains a highly theoretical scenario.

2 Cryer et al., 2017, p. 307.

3 Rome Statute of the International Criminal Court, Rome, 17 July 1998, United Nations, Treaty Series, vol. 2187, p. 3.

2. Historical Background of the Crime of Aggression

2.1 State Responsibility for Aggression vs. Individual Criminal Responsibility for Aggression

The notions of *jus contra bellum* and the “law of aggression” gradually developed in international law throughout the 20th century. The 1919 Covenant of the League of Nations was the first milestone to embody a real commitment to outlaw war, with Article 10 providing, ‘[T]o respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League’. Although the League of Nations’ peace-making initiatives might not have been successful, Article 10 demonstrated a paradigm shift in the way the international community thought about war in general terms. The 1928 Kellogg-Briand Pact, also known as the General Treaty for the Renunciation of War, was another remarkable milestone in restricting the use of force as a legitimate political instrument to settle inter-State disputes. In 1933, the Soviet Union and its neighbouring States also signed a convention⁴ to define “aggression”, which was remarkable not only for pioneering the definition of aggression⁵ but also for being a model for future aggression concepts. Eventually, the 1945 Charter of the United Nations (hereinafter, UN Charter), under Article 2(4),⁶ stipulated the prohibition of the use of force with two narrow exceptions: the use of force upon the authorisation of the UN Security Council in accordance with Article 42⁷ or the individual or collective self-defence by

4 Convention for the Definition of Aggression, London, 3 July 1933.

5 Convention for the Definition of Aggression Article 2:

Accordingly, the aggressor in an international conflict shall, subject to the agreements in force between the parties to the dispute, be considered to be State which is the first to commit any of the following actions:

(1) Declaration of war upon another State;

(2) Invasion by its armed forces, with or without a declaration of war, of the territory of another State;

(3) Attack by its land, naval or air forces, with or without a declaration of war, on the territory, vessels or aircraft of another State;

(4) Naval blockade of the coasts or ports of another State;

(5) Provision of support to armed bands formed in its territory which have invaded the territory of another State, or refusal, notwithstanding the request of the invaded State, to take, in its own territory, all the measures in its power to deprive those bands of all assistance or protection.

6 UN Charter Article 2(4):

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

7 UN Charter Article 42:

Should the UN Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

States in accordance with Article 51.⁸ Although these instances are significant antecedents of the drafting process of the rules for addressing the crime of aggression, they did not pave the way for individual criminal responsibility, since all of the abovementioned treaty provisions focused on the responsibility of States.

The crime of aggression *per se* was first recognised under Article 6(a) of the 1945 Charter of the Nuremberg IMT and under Article 5(a) of the 1946 Charter of the Tokyo IMT as follows:

Crime against peace: namely, the planning, preparation, initiation, or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

Nonetheless, objections by the accused emerged before the Nuremberg IMT, stating that its charter created new law, and subsequently, the tribunal was applying law *ex post facto* and breaching the principle of *nullum crimen sine lege*. The Nuremberg IMT dismissed this objection and highlighted that, since the 1928 Kellogg-Briand Pact, aggressive war had qualified as a crime under international law.⁹ The Nuremberg IMT was also heavily criticised for providing victors' justice and for selectiveness, since it disregarded wars of aggression launched by the Soviet Union. Similarly, the Tokyo IMT followed this reasoning; however, three judges attached dissenting opinions to the judgement,¹⁰ arguing that the 1928 Kellogg-Briand Pact was never meant to open the floor to individual criminal responsibility.¹¹ May that as it be, it is generally accepted in contemporary scholarly discussions and also in jurisprudence that a definition of a crime of aggression now exists under international customary law in line with the case-law of the Nuremberg and Tokyo IMTs.¹² Moreover, in 1950, the International Law Commission (ILC) issued the collection of

8 UN Charter Article 51:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the UN Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the UN Security Council and shall not in any way affect the authority and responsibility of the UN Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

9 *In the opinion of the tribunal, the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing.* (Nuremberg IMT, Judgment and Sentences, reprinted in (1974), 41, *American Journal of International Law* 172, 218).

10 Cryer et al., 2017, p. 308.

11 Weigend, 2012, p. 41.

12 Brownlie, 1963, pp. 185–194; Dinstein, 2011.

the so-called “Nuremberg Principles”¹³ affirming that crimes against peace make up a part of international custom, as evidence of a general practice accepted as law.

Some decades later, on 14 December 1974, the UN General Assembly adopted Resolution 3314 (XXIX) (hereinafter, UN General Assembly Resolution 3314) on the definition of aggression focusing (again) on possible acts of States. This resolution starts with a broad definition of aggression committed by States and then enumerates specific and typical examples. However, as the ILC highlighted,¹⁴ UN General Assembly Resolution 3314 ‘*deals with aggression by States, not with the crimes of individuals, and is designed as a guide for the UN Security Council, not as a definition for judicial use*’. Subsequently, under this resolution, the UN General Assembly made a clear distinction between State acts of aggression and war of aggression entailing individual criminal responsibility.

2.2 The Road Leading from Rome to Kampala

Negotiations to establish the ICC began in 1994, when the ILC proposed a Draft Statute for an International Criminal Court¹⁵ (hereinafter, Draft Statute). Article 23(2) of the Draft Statute established the court’s jurisdiction over the crime of aggression, with one major precondition: the need for prior determination by the UN Security Council that the respective State had committed aggression. Considering independence as an essential feature of judicial bodies, this approach proved controversial, and no compromise was reached on whether the definition of the crime of aggression should be included under the Statute, or if so, how it should be defined, and what role the UN Security Council should play in aggression situations.¹⁶

From the beginning of the drafting process, the dilemma of whether to include the definition of the crime of aggression in the Rome Statute was among the most heated debates at the 1998 Rome Diplomatic Conference (hereinafter, Rome Conference),¹⁷ which finally led to the establishment of the ICC. Although aggression was one of the four core crimes enumerated in the Rome Statute when it was adopted in 1998, the completion of the definition and the details of the exercise of jurisdiction were adjourned for further negotiations. Until then, Article 5(2) provided that:

The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with Articles 121 and 123 defining the crime

13 Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, *Yearbook of the International Law Commission*, 1950, Vol. II, para. 97, Principle VI.

14 Draft Statute for an International Criminal Court with Commentaries 1994, *Yearbook of the International Law Commission*, 1994, Vol. II, Part Two, Article 20, para. 6.

15 Ibid.

16 Cryer et al., 2017, p. 310.

17 Diplomatic Conference on the Establishment of an International Criminal Court, Rome, 15 June to 17 July 1998.

*and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.*¹⁸

Therefore, when the Rome Statute became effective, in accordance with Article 5(2), it was not possible to initiate procedures of aggression until the States Parties to the ICC Statute reached an agreement on the definition. Consequently, the participating States at the Rome Conference did not accept a compromise regarding the definition of the crime of aggression.

The issue of aggression was undoubtedly the highest ‘debt’ of the Rome Conference,¹⁹ which had to be settled at the first Review Conference of the ICC Statute (hereinafter, the Review Conference).²⁰ The obligation to convene the first Review Conference, seven years after the entry into force of the Rome Statute, was laid down in Article 123(1)²¹ for the UN Secretary-General, at which the concept of the crime of aggression was adopted in accordance with the provisions cited above.²² To arrive at a definition that is widely accepted by States Parties, the Assembly of States Parties (ASP) established a Special Working Group on the Crime of Aggression (SWGCA),²³ which was tasked with preparing draft provisions to be presented at the Review Conference. The SWGCA met several times between 2003 and 2009, and the draft standards it prepared, summarised in the SWGCA’s latest report,²⁴ became the starting point for the negotiations held in Kampala. This report contained two additional provisions to the Rome Statute: Article 8 *bis* defined the crime of aggression, whereas Article 15 *bis* defined the conditions for exercising jurisdiction over the crime of aggression.

Article 8 *bis* proposed by the SWGCA did not contain any alternatives, only the version that was finally adopted verbatim at the Review Conference.²⁵ Regarding the content of the provision, it is noteworthy that it also distinguishes between the crime of aggression and the act of aggression, opening the floor for the criminal responsibility of individuals alongside that of States. Furthermore, Article 8 *bis*(2)

18 Article 21 of the Rome Statute provides amendments, whereas Article 123 enshrines the first review of the Rome Statute.

19 Clark, 2010, p. 689.

20 The Review Conference of the Rome Statute, held in Kampala, Uganda, from 31 May to 11 June 2010 adopted the amendments on the crime of aggression on 11 June 2010 by Resolution RC/Res.6.

21 Rome Statute Article 123(1):

Seven years after the entry into force of this Statute the Secretary-General of the United Nations shall convene a Review Conference to consider any amendments to this Statute. Such review may include, but is not limited to, the list of crimes contained in article 5. The Conference shall be open to those participating in the Assembly of States Parties and on the same conditions.

22 The Crime of Aggression, ICC Resolution RC/Res.6, 11 June 2010.

23 The possibility to participate in the SWGCA was open not only to States Parties to the Rome Statute, but to all States. See Continuity of Work on the Crime of Aggression, ICC-ASP/1/Res.1, 9 September 2002.

24 Report of the SWGCA, ICC-ASP/7/SWGCA/2, 20 February 2009.

25 Rome Statute ASP RC/Res.6, 11 June 2010.

of the Rome Statute, in line with Article 1 of UN General Assembly Resolution 3314, reiterates:

For the purpose of this Statute, “crime of aggression” means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

Article 8 bis(2) also enumerates the acts of aggression listed by way of examples under UN General Assembly Resolution 3314.²⁶

Subsequently, the respective provisions of the Rome Statute preserve the concept of UN General Assembly Resolution 3314 regarding the distinction between the crime of aggression and the unlawful use of force, whereby only the most serious forms of the latter fall within the scope of the crime. Therefore, all forms of aggression amount to the use of force, but not all forms of the use of force qualify as aggression.²⁷ However, the practical transposition of UN General Assembly Resolution 3314 raised some significant concerns during the drafting process, since, under this resolution, the UN Security Council enjoys broad discretionary powers regarding establishing the commitment of aggression. The UN Security Council is not obliged to establish aggression when an act of aggression *pro forma* has been committed, but it can establish the commitment of an act of aggression even if it has not been committed in line with the conducts enumerated under Article 3 of UN General Assembly Resolution 3314. As Hárs points out: ‘as a political body [the UN Security Council] does not necessarily decide according to legal criteria, so that political necessity

26 UN General Assembly Resolution 3314 Article 3:

Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression:

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof,

(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(c) The blockade of the ports or coasts of a State by the armed forces of another State;

(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

27 Valki, 2018, pp. 768–771.

and compromise may dominate its decisions²⁸; thus, the UN Security Council, as a political decision-maker, is not bound by the principle of legality in the same way as a criminal court. Consequently, the application of an open-ended list is not a viable option in the case of the ICC and establishing criminal responsibility; therefore, the list as transposed into the Rome Statute can only be interpreted *stricto sensu*.²⁹

Compared to Article 8 *bis*, the drafting process of Article 15 *bis* proved to be much harder, partly due to the future legal status of States that did not ratify the Kampala Amendments, and partly due to the role of the UN Security Council in determining whether an act of aggression had been committed.³⁰ According to the ILC's Draft Statute, as has already been mentioned above, the ICC's jurisdiction over the crime of aggression would have relied on the resolutions of the UN Security Council establishing the commitment of an act of aggression. Nevertheless, this textual version, despite the unsurprising lobby of France and the United Kingdom, was considered by States to be highly problematic because of the evident anomalies in the operational effectiveness of the UN Security Council and the limited participation of UN Member States in its decision-making. Thus, the majority of the drafting States considered that the Rome Statute should not give the UN Security Council exclusive powers to determine an act of aggression.³¹ Additionally, further doubts emerged that the veto power of the permanent members of the UN Security Council could potentially paralyse the ICC's jurisdiction over aggression for good, both over themselves and their allies.³²

Unsurprisingly, it was the P5 that sought to argue for the exclusive power of the UN Security Council based on Article 39³³ of the UN Charter to determine whether aggression was committed; however, the view that although the UN Security Council's responsibility for the maintenance of international peace and security is primary, it is not exclusive, eventually prevailed, as it is reflected under Article 24³⁴ of the

28 Hárs, 2018, para. 7.

29 Clark, 2015, p. 782.

30 Blokker – Kreß, 2010, p. 889; Trahan, 2011, p. 49.

31 Kreß – von Holtzendorff, 2010, p. 1194.

32 Cassese, 1999, pp. 144, 147.

33 Article 39 of the UN Charter:

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

34 Article 24 of the UN Charter:

1) In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

2) In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII.

3) The Security Council shall submit annual and, when necessary, special reports to the General Assembly for its consideration.

UN Charter.³⁵ This approach was reaffirmed by, on the one hand, the practice of the UN General Assembly that had also on several occasions established that acts of aggression had taken place, and on the other hand, by the fact that the United States, the United Kingdom, and France had supported the adoption of UN General Assembly Resolution “Uniting for Peace”³⁶ in 1950, which recognised the UN plenary organ’s competence in this regard. As a further argument against exclusive powers of the UN Security Council, the non-permanent members of the Council also pointed out that the International Court of Justice (ICJ) itself has repeatedly dealt with cases where the question of aggression has been raised,³⁷ although the ICJ has been more cautious than actually weaving the term “aggression” into the text of its decisions.

However, we should bear in mind that the crime of aggression and the act of aggression go hand in hand in the sense that one cannot condemn someone for a crime without expressing condemnation of the State.³⁸ Thus, the ILC, when codifying the Rome Statute, took the view that it would be inappropriate for the ICC to convict someone of the crime of aggression in the absence of a finding of an act of aggression by the State, and the ILC considered the UN Security Council to be best placed to play the latter role, in accordance with Chapter VII of the UN Charter.³⁹

Therefore, the SWGCA’s real achievement was to draft a textual version that does not make the determination on an act of aggression exclusively dependent on an external body, the UN Security Council, the UN General Assembly, or even the ICJ, while it does not make it obligatory for the ICC to accept the qualification of an external body so as to respect the presumption of innocence, which is explicitly enshrined in Articles 15 *bis*(9) and 15 *ter*(4) of the Rome Statute, and it gives due effect to the powers of the UN Security Council in this respect. The compromise reached in Kampala was therefore to split the first draft of Article 15 *bis* into two separate articles, 15 *bis* and 15 *ter*, which categorise the procedure for initiating aggression proceedings according to the triggering mechanisms, State Party referrals and *proprio motu* procedures on the one hand and UN Security Council referrals on the other hand. Due to these special rules under the Rome Statute regarding the crime of aggression, the Kampala regime functions as *lex specialis* compared to other core crimes.

35 Clark, 2015, p. 786.

36 UN Doc. GA/RES/377 (7 October 1950).

37 ICJ, Case Concerning the Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States), Judgment, 27 June 1986; ICJ, Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgement, 19 December 2005.

38 Crawford, 1994, p. 147.

39 Crawford, 1995, p. 411.

3. The Crime of Aggression under the Rome Statute

Article 5 of the Rome Statute emphasises that only the most serious crimes of concern to the entire international community can entail criminal proceedings before the ICC and it provides on a list of atrocity crimes falling under the subject-matter jurisdiction of the court: the crime of genocide, crimes against humanity, war crimes, and the crime of aggression. This textual version of Article 5 has been in force for more than six years now, when the Kampala Amendments, adopted at the Review Conference in 2010, became effective as a consequence of an agreement among States Parties on the activation of the ICC's jurisdiction over the crime of aggression on 15 December 2017. Currently, 47 States have ratified the Kampala Amendments.⁴⁰ While this is a relatively high number, compared to the number of States Parties to the Rome Statute (125), there is no reason for much optimism. In the next part, we analyse the substantial elements of the crime of aggression, then examine the jurisdictional regime adopted in Kampala.

The crime of aggression has a *sui generis* jurisdictional regime under the Rome Statute, which differs from the manner in which the ICC's jurisdiction can be triggered in the event of other atrocity crimes. Under Article 15 *bis* and Article 15 *ter* three triggering mechanisms may apply: (i) when a State Party or a group of States Parties refers a situation to the ICC; (ii) when the Prosecutor initiates an investigation *proprio motu*; or (iii) when the UN Security Council refers a situation to the Court. As a general rule, States that are not parties to the Rome Statute are excluded from the ICC's jurisdiction over the crime of aggression either from the side of victims or aggressors; however, this rule does not apply to a UN Security Council referral. With regard to a State Party referral or a *proprio motu* investigation (Article 15 *bis*), the ICC will only be able to proceed with the investigation on a reasonable basis if the Kampala Amendments have entered into effect for either the victim or the aggressor. If so, the Prosecutor shall inform the UN Secretary-General about the situation. Additionally, the UN Security Council has the authority to determine whether an act of aggression has been committed by the respective State Party. The deadline to make such a determination is six months. If the UN Security Council fails to determine the commitment of an act of aggression, the Prosecutor may still proceed with an investigation with the authorisation of the Pre-Trial Division of the ICC. The procedure in the case of a UN Security Council referral (Article 15 *ter*) is different from the procedure of the other two triggering mechanisms. If the UN Security Council refers a matter to the ICC, the Prosecutor will have the authority to investigate the crime of aggression committed in any State territory and by any State's national. In other words, for a UN Security Council referral, it is irrelevant whether the victim or the aggressor is a non-State Party, whether the aggression has taken place in the territory of a non-State Party, or whether the aggression has been

40 Amendments on the Crime of Aggression to the Rome Statute of the International Criminal Court, Kampala, 11 June 2010. United Nations Treaty Collection, Chapter XVIII, 10.b.

committed by a national of a non-State Party. Moreover, for a UN Security Council referral, the individual ratification status or “opt-out” status of a State Party to the Rome Statute is also irrelevant.

3.1 Substantial Aspects: An Analysis of Article 8 bis

International criminal law is a tool (sometimes moderate, but still promising) of the rule of law to combat against unlawful recourse to armed conflicts and bring the authors of war to justice. Nonetheless, thanks to its heavily politicised character, the issue of aggression has always been the most sensitive among core crimes, as the individual’s crime of aggression goes hand in hand with the State’s act of aggression. In other words, these two concepts do not exist exclusively of each other, and as there is “no smoke without fire”; therefore, there is no crime without the condemnation of a high-ranking policy-maker (political leader, military commander, State official, etc.) as well as of the entire State. This is why aggression is also labelled as a “leadership crime”: In essence, the crime of aggression is an international crime committed by a State leader who takes part in an act of aggression carried out as part of a plan or policy. The crime of aggression protects State sovereignty by prohibiting the unlawful use of force; however, it also encroaches on State sovereignty, similar to other core crimes, when installing individual criminal responsibility deriving directly from international law.⁴¹ The crime of aggression substantially differs from other core crimes, as it relates to *jus ad bellum* and necessarily and parallelly raises the issue of State responsibility. This also means that aggression may neither be committed by members of the armed forces, breaching the rules concerning *jus in bello*, nor the leaders of non-State groups.⁴² The unique character of this crime also explains why its drafting process took so long. While the crime of genocide, crimes against humanity, and war crimes have more in common with human rights issues, which lay at the heart of the development of international law in the Cold War era, the crime of aggression protects primarily against the unlawful use of force, rather than protecting human rights.⁴³

Since 17 July 2018, the ICC has had jurisdiction over the crime of aggression. Although this fact *per se* marks a considerable milestone in the fight against impunity,⁴⁴ the business is far from finished. Certainly, establishing individual criminal responsibility for the authors of war has a great moral and symbolic significance; nevertheless, from a legal perspective, the definition of and the conditions of exercising jurisdiction over the crime of aggression are by no means optimal.

41 Cryer et al., 2017, p. 307.

42 Aronsson-Storrier, 2024, p. 437.

43 Ozaki, 2024, ‘The Jurisdictional System of the Rome Statute’ *Presentation at the 1st International Conference on Contemporary Challenges of International Criminal Justice*, Kraków Center for International Criminal Justice, Poland, 1 June 2024.

44 As the Rome Statute Preamble para. 4 enshrines: *Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished [...]*.

The great novelty of the Rome Statute is, at least theoretically, to fill in the gap of impunity and hold leaders who are legally capable of committing aggression individually accountable. Article 8 *bis*, based largely on UN General Assembly Resolution 3314, provides as follows:

(1) For the purpose of this Statute, “crime of aggression” means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

(2) For the purpose of paragraph 1, “act of aggression” means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(c) The blockade of the ports or coasts of a State by the armed forces of another State;

(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

In accordance with Article 8 *bis*, the crime of aggression has three main characteristics: (i) it focuses on the most responsible; (ii) who participates in (plans, prepares, initiates, or executes) an act of aggression of the State; and (iii) this act by its character, gravity, and scale, constitutes a manifest violation of the UN Charter.

As mentioned earlier, aggression is a “leadership crime” by a powerful perpetrator who participates in a State’s policy-making on a high-level; but how high should this level be to qualify as a leadership crime? The American Military Tribunal, established under Control Council Law No. 10,⁴⁵ stated that ‘*the criminality which attaches to the waging of an aggressive war should be confined to those who participate in it at the policy level*’.⁴⁶ Therefore, in this case, even though the fourteen defendants were senior military officials (one admiral, thirteen generals), they were not at the required policy level to be criminalised for a crime against peace. In other words, the perpetrator of aggression is *de jure* or *de facto* in the position to make decisions attributable to the State. The phrase ‘in a position to effectively exercise’ theoretically covers not only State or military officials in formal positions but also basically anyone who has a certain level of influence over the policy-making mechanisms of the State.⁴⁷ However, as Aronsson-Storrier,⁴⁸ Heller,⁴⁹ McDougall,⁵⁰ and Politi⁵¹ highlighted, this is highly unlikely to happen, since the phrase ‘exercise control over or to direct the political and military action of the State’ sets such a high threshold that non-formal leaders cannot meet. It remains to be seen how the ICC judges would apply the “control or direct” test in practice. In line with the jurisprudence of the ICJ and the International Criminal Tribunal for the Former Yugoslavia (ICTY), two different approaches prevail. The ICJ had applied the “effective control” test in the *Case Concerning the Military and Paramilitary Activities in and Against Nicaragua*⁵² respecting the level of State control over an armed group, and later, it reaffirmed its stance in the *Case of Application of the Convention on the Prevention and Punishment of the Crime of Genocide*.⁵³ By contrast, the ICTY applied the “overall control” test in *The Prosecutor v. Tadić* judgement.⁵⁴ As Cassesse highlighted, judicial decisions support the view that whenever the conduct of organised armed groups or military units is at stake, it suffices to show that the State to which they may be linked exercises “overall control” over them, in order for the conduct of those groups or units to be legally attributed to the State, whereas the ICTY applied the “overall control” test as a criterion generally valid for the imputation of the conduct of organised armed groups to a particular State. Nonetheless, the ICTY did not exclude the applicability of the

45 Control Council Law No. 10, XII LRTWC 1.

46 Ibid.

47 Aronsson-Storrier, 2024, p. 445.

48 Ibid.

49 Heller, 2007, p. 470.

50 McDougall, 2013, p. 181.

51 Politi, 2012, p. 285.

52 ICJ, *Case Concerning the Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, Judgment, 27 June 1986, para. 115.

53 ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007.

54 ICTY, *Prosecutor v. Tadić*, Appeals Chamber, Judgement, IT-94-1-A, 15 July 1999.

“effective control” standard, stating, however, that it only applied for the attribution to a State of conduct by single private individuals.⁵⁵

In accordance with Article 8 *bis*(1) of the Rome Statute, ‘planning, preparation, initiation or execution’ constitute the necessary nexus between the State’s act of aggression and the individual’s act. In line with Element 3, Article 8 *bis* of the Elements of Crimes,⁵⁶ taking part in threats to use aggression does not result in criminal responsibility. Planning, preparation, initiation, or execution must occur to constitute a crime. According to one of the commentaries of the Rome Statute, “planning” means that the perpetrator participates in meetings where plans on the aggressive act are made; “preparation” means a wide range of activities such as diplomatic, economic, and military activities; “initiation” means decisions made on a strategic level; and “execution” encompasses acts performed after the commencement of the aggressive act.⁵⁷

The third key element of the crime of aggression is the “manifest violation” of the UN Charter by its character, gravity, and scale. Academic discussions vary on whether it is sufficient that two of the three components are present and meet the standard, or all three components must be present at a time, however, not to the same degree.⁵⁸ These elements constitute an objective qualification; therefore, the subjective assessment of the victim State is not sufficient to constitute a crime. The criteria of “manifest violation” suggests that only major violations of *jus ad bellum* constitute a crime of aggression, and it is also a safeguard to exclude “grey areas” of the use of force, for example, humanitarian intervention or anticipatory self-defence from the scope of the crime of aggression.⁵⁹ As for the *mens rea* of the crime, there is no need to prove that the perpetrator has made a legal evaluation of the “manifest” nature of his or her act, as being aware of the factual circumstances of the use of force is sufficient.⁶⁰

An act of aggression is defined under Article 8 *bis* (2) of the Rome Statute, and this paragraph is strongly tied with Articles 1 and 3 of UN General Assembly Resolution 3314 and Article 8 *bis* (1) of the Rome Statute, respectively. Albeit the ICC is an independent judicial body, and “outside” determinations of an act of aggression are not binding upon it, resolutions of the UN Security Council and judgements (or advisory opinions) of the ICJ could still have an impact on the court when deliberating the commitment of an act of aggression. However, one should bear in mind that the decisions of the UN Security Council and the ICJ are made in connection with *jus ad bellum* and State responsibility, not in connection with international criminal law and individual criminal responsibility. It should be noted that Article 3 of UN

55 Cassesse, 2007, pp. 649–668.

56 International Criminal Court, Elements of Crimes.

57 Aronsson-Storrier, 2024, pp. 441–444.

58 McDugall, 2013, pp. 128–130; Kreß and von Holtzendorff, 2010, p.1207.

59 Aronsson-Storrier, 2024, pp. 448–449; Hoffmann, 2019, pp. 64–67; Kreß, 2018, p. 16; Mégret, 2018, p. 853.

60 Aronsson-Storrier, 2024, pp. 449–450.

General Assembly Resolution 3314 was heavily criticised for being inconsistent with the definition of aggression under customary international law.⁶¹ As pointed out by the ICJ in the *Case of Armed Activities on the Territory of the Congo*,⁶² some acts, such as the allowance of a territory to be used for acts of aggression against a third State, are uncertain. Although the lack of a customary background is not relevant in the case of States Parties where the Rome Statute provides a legal basis for binding obligations, when a situation connected with a non-State Party is referred to the ICC by the UN Security Council, it might lead to ambiguity.

3.2 Procedural Aspects: An Analysis of Articles 15 *bis* and 15 *ter*

Article 15 *bis* on the exercise of jurisdiction over the crime of aggression (State referral, *proprio motu*) of the Rome Statute provides as follows:

(1) *The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraphs (a) and (c), subject to the provisions of this article.*

(2) *The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.*

(3) *The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.*

(4) *The Court may, in accordance with article 12, exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar. The withdrawal of such a declaration may be effected at any time and shall be considered by the State Party within three years.*

(5) *In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory.*

(6) *Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the UN Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.*

61 Aronsson-Storrier, 2024, pp. 451.

62 ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgement, 19 December 2005.

(7) Where the UN Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.

(8) Where no such determination is made within six months after the date of notification, the Prosecutor may proceed with the investigation in respect of a crime of aggression, provided that the Pre-Trial Division has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15, and the UN Security Council has not decided otherwise in accordance with article 16.

(9) A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.

(10) This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.

Article 15 *ter* on the exercise of jurisdiction over the crime of aggression (UN Security Council referral) provides as follows:

(1) The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraph (b), subject to the provisions of this article.

(2) The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.

(3) The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.

(4) A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.

(5) This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.

Article 15 *bis*(1) of the Rome Statute covers situations and cases where a State Party (Article 13(a)) or the Prosecutor (Article 13(c)) triggers a procedure before the ICC, and it establishes the legal framework for the court to exercise jurisdiction over the crime of aggression. In parallel, Article 15 *ter*(1) makes a similar provision in relation to Article 13(b) of the Rome Statute, where a situation is referred to the ICC by the UN Security Council, in which case the initiation of proceedings is not conditional on the prior determination by the UN Security Council that an act of aggression has occurred.⁶³ Paragraphs (2) and (3) of both articles are literally the same; they impose additional conditions for the effective exercise of jurisdiction. Articles 15 *bis*(2) and 15 *ter*(2) provide: *The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance*

63 Kreß – von Holtzendorff, 2010, p. 1211.

of the amendments by thirty States Parties, whereas Articles 15 bis(3) and 15 ter(3) provide: *The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.* Although the Kampala Amendments achieved the 30 ratifications required by Articles 15 bis(2) and 15 ter(2) on 26 June 2016, this did not mean that the ICC would automatically exercise jurisdiction over the crime of aggression from 26 June 2017. The Assembly of States Parties voted on the activation of jurisdiction on 14 December 2017, by consensus of those present,⁶⁴ setting the date of the entry into force of the Kampala Amendments for those States that ratify or accept them for 17 July 2018. Participation in the vote on the activation of jurisdiction over aggression was not conditional on the ratification of the Kampala Amendments, which is a direct consequence of the fact that the former required two-thirds of the States Parties, whereas the latter required only 30 ratifications. Furthermore, in relation to Article 15 ter(2), Clark highlights that the requirement of 30 ratifications was only a procedural limitation on the UN Security Council and that, since the requirements of Article 15 ter were already met, the UN Security Council could have brought aggression proceedings before the ICC not only against States that had accepted the amendments, but even against any State, including, by implication, States not parties to the Rome Statute.⁶⁵

Article 15 bis(4) provides an opt-out clause applicable to proceedings under Articles 13(a) and 13(c). The legal status of States Parties to the Rome Statute that accepted or ratified the Kampala Amendments was the long-simmering Achilles heel of the SWGCA's negotiations. As a solution, it was initially suggested that under Article 12(1),⁶⁶ States Parties that did not ratify the Kampala Amendments should be bound by these amendments unless they opted out,⁶⁷ while others, referring to Article 121(5) of the Rome Statute,⁶⁸ argued for an *express verbis* declaration of submission to jurisdiction regardless of their ratification status.⁶⁹ Eventually, the second approach prevailed in Kampala, and an opt-out procedure was introduced into the regime of the Rome Statute. Under Article 120, no reservations can be attached to the Rome Statute; therefore, States Parties that did not accept the Kampala Amendments as binding on them could request a waiver from the exercise of jurisdiction over

64 Rome Statute ASP Resolution ICC-ASP/16/Res.5, 14 December 2017.

65 Clark, 2015, p. 788.

66 Article 12(1) of the Rome Statute: *A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.*

67 Kreß – von Holtzendorff, 2010, p. 1213; McDougall, 2013, pp. 258–259.

68 Article 121(5) of the Rome Statute:

Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.

69 Van Schaack, 2010–2011, p. 598.

aggression by submitting a declaration to the ICC Registrar. However, in the absence of case-law, what happens if a State has neither ratified the Kampala Amendments nor made an opt-out declaration is still unclear. The possibility to make an opt-out declaration opens the door for several different interpretation issues around the exercise of jurisdiction in aggression cases, which can be summarised as follows.

(i) In relation to Article 15 *bis*(4), questions of interpretation arise as to whether the phrase ‘*exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party*’ should be applied to acts of aggression by States Parties in general, or only to acts of aggression by States Parties that have accepted or ratified the Kampala Amendments. Sticking to the result of normative interpretation of Article 15 *bis*(4), there is no need to limit the scope of this provision to the States Parties that have accepted or ratified the Kampala Amendments; however, generally, Article 121(5) of the Rome Statute contradicts this approach as, ‘*in respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party’s nationals or on its territory*’.

(ii) In addition to Article 121(5), Article 12 raises some interpretation issues regarding Article 5 *bis*(4). Most scholars argue that the ICC has jurisdiction over the crime of aggression when both the aggressor and the victim are States Parties to the Rome Statute and have ratified the Kampala Amendments but have not submitted an opt-out declaration to the ICC Registrar.

(iii) Meanwhile, there is a consensus that the ICC does not have jurisdiction where the aggressor is a State Party but has exercised its opt-out power.⁷⁰

(iv) There also exists a broad doctrinal consistency that where the aggressor is a State Party that has neither accepted or ratified the Kampala Amendments nor has submitted an opt-out declaration, but the victim has ratified the Kampala Amendments, the ICC has jurisdiction under Article 12(2) a) of the Rome Statute, regardless of whether the victim has previously made an opt-out declaration.⁷¹ Nonetheless, Milanović observes that a restrictive interpretation is also possible here, in the light of which the ICC’s jurisdiction does not exist here because the aggressor did not accept the Kampala Amendments *expressis verbis* in accordance with Article 121(5) of the Rome Statute.⁷²

(v) In situations where the aggressor is a State Party but it neither ratified the Kampala Amendments nor made an opt-out declaration, and the victim has not ratified the Kampala Amendments, the ICC has no jurisdiction over the aggressor, whether or not the latter has exercised its waiver.⁷³ In such a hypothetical case, the ICC could have jurisdiction if the State Party that has not ratified the Kampala

70 McDougall, 2013, p. 261; Reisinger Coracini, 2010, p. 782; Milanović, 2012, p. 182.

71 McDougall, *ibid.*; Reisinger Coracini, *ibid.*; Milanović, *ibid.*

72 Milanović, *ibid.*

73 McDougall, *ibid.*; Reisinger Coracini, *ibid.*; Milanović, *ibid.*

Amendments were to make an *ad hoc* declaration of submission under Article 12(3) of the Rome Statute, although the chances of this scenario are very slim.⁷⁴

(vi) Further uncertainties appear where the aggressor State Party has not ratified the Kampala Amendments and has not made an opt-out declaration, while the victim State Party has ratified the Kampala Amendments. According to the literature, there are two possible approaches to this scenario. The first one is the “expansive” or “permissive” view where the ICC’s jurisdiction under Article 12(2) a) is maintained regardless of whether or not the victim has made an opt-out declaration.⁷⁵ The second one is the “restrictive” view, which argues, under Article 121(5) of the Rome Statute, that the ICC cannot have jurisdiction because the aggressor State has not ratified the Kampala Amendments.⁷⁶

(vii) A similar question might be raised where the aggressor State Party has ratified the Kampala Amendments and has not made an opt-out declaration, but the victim State Party has not ratified them. Here again, the proponents of the “expansive” interpretation invoke Article 12(2) a) of the Rome Statute to argue that the ICC has jurisdiction, whereas the proponents of the “restrictive” view derive from Article 121(5) that in order to exercise jurisdiction over aggression, both the aggressor and the victim must ratify the Kampala Amendments.⁷⁷

Article 15 *bis*(5) of the Rome Statute establishes a significant limitation applicable only to situations triggered by States Parties or the Prosecutor when reaffirming:

in respect of States which are not States Parties to the present Statute, the Court shall not exercise jurisdiction over the crime of aggression if such crime is committed by a national of a State not a Party or is committed in the territory of a State not a Party.

Although there have been some suggestions that the ICC has jurisdiction over the crime of aggression under Article 12(2) even if the victim is not a State Party, most scholars disagree.⁷⁸ What is certain is that jurisdiction does not exist if the aggressor State Party has not ratified the Kampala Amendments and the victim is not a State Party to the Rome Statute. The same applies if the aggressor State Party has made an opt-out declaration, in which case it does not matter whether it has ratified the Kampala Amendments. It is also clear that the court cannot exercise jurisdiction over the crime of aggression if the aggressor State is not a Party to the Rome Statute. Additionally, it remains to be seen whether the ICC’s jurisdiction over the crime of aggression can be accepted on an *ad hoc* basis under Article 12(3) of the Rome Statute.⁷⁹

74 McDougall, *ibid.*; Reisinger Coracini, *ibid.*; Kreß – von Holtzendorff, 2010, p. 1214.

75 McDougall, *ibid.*; Reisinger Coracini, *ibid.*; Milanović, *ibid.*

76 Akande, 2011, p. 27.

77 Akande, *ibid.*; Milanović, *ibid.*

78 McDougall, *ibid.*; Reisinger Coracini, *ibid.*; Milanović, *ibid.*

79 Akande – Tzanakopoulos, 2018, p. 954; Stahn, 2010, p. 880; McDougall, 2013, p. 264; Reisinger Coracini, 2010, p. 781; Kreß – von Holtzendorff, 2010, p. 1214.

Under Articles 15 *bis*(6), (7), and (8), there are substantial provisions related to the UN Security Council. Article 15 *bis*(6) applies not only to proceedings initiated by the ICC Prosecutor *proprio motu* under Articles 13(c) and 15 of the Rome Statute but also to all proceedings triggered by States Parties, immediately before the opening of an investigation. The qualification that an act of aggression has been committed is evident in cases where the term “act of aggression” is used literally in a UN Security Council resolution; however, the terminology concerning the use of force under the UN Charter is, in the words of Hoffmann, followed by “*conceptual chaos and substantive ambiguity*”,⁸⁰ and consequently, the terms of “a State being aggressive” or “aggressive behaviour” are more often used in UN Security Council resolutions instead of the term “act of aggression”. It is also unclear whether the establishment of an act of aggression should be included in the operative part of a UN Security Council resolution or whether it is sufficient for the UN Security Council to express concern about an “aggressive state” or “aggressive behaviour” in the preamble to that resolution. Notification by the UN Secretary-General is a prerequisite for the opening of an investigation, and in cases where the UN Security Council has not established the commission of an act of aggression, the six-month deadline starts from the date of the notification.

The forthcoming provisions of the Rome Statute outline two alternatives. First, where the UN Security Council has established the commission of an act of aggression, and second, where it has not done so within six months of the notification by the UN Secretary-General. Thus, under Article 15 *bis*(7), the Prosecutor does not need further authorisation to open an investigation if the act of aggression has been established by the UN Security Council, unless, under Article 15 *bis*(10), there are reasonable grounds to believe, in addition to the act of aggression, the commission of genocide, crimes against humanity or war crimes, in which case the Pre-Trial Division may need to give specific authorisation to open an investigation.

Article 15 *bis*(8) provides that in the absence of a UN Security Council resolution on an act of aggression, the opening of an investigation is, in any event, subject to authorisation, even if it is initiated by a State Party where the competent judicial organ is the ICC Pre-Trial Division, which shall be composed of not less than six judges in accordance with Article 39(1). Furthermore, under Article 15 *bis*(8), it is clear that the UN Security Council’s power of deferral under Article 16 of the Rome Statute applies to aggression proceedings as well, that is, the UN Security Council may defer investigations or prosecutions for 12 months under Chapter VII of the UN Charter.

Finally, Articles 15 *bis*(9) and 15 *ter*(4) are key points for the ICC’s autonomy, its well-functioning as a criminal court, the right to a fair trial, and the presumption of innocence. It is worth recalling that these two articles provide: *A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court’s own findings under this Statute.* Subsequently, the ICC is free to make a discretionary finding on the commission of aggression: it can find that an act of aggression has

80 Hoffmann, 2019, p. 47.

been committed in the absence of a UN Security Council resolution, or it can even decide that no act of aggression has been committed even if it has been previously established by the UN Security Council or the ICJ.

4. Concluding Remarks

The gradual evolution of the rules concerning *jus contra bellum* is an achievement of post-world-wars' development of international law, which created the preconditions of individual criminal responsibility for the crime of aggression. A real symbolic breakthrough occurred when the Kampala Amendments to the Rome Statute were adopted and the ICC's jurisdiction over aggression was activated. Nevertheless, whether this jurisdiction regime is operational remains to be seen. From my perspective, the statutory regime in effect on the crime of aggression is extremely complex, and undermines the real-life applicability and functionality of the Kampala Amendments. Unsurprisingly, initiatives to modify and simplify the aggression provisions are currently underway. The Global Institute for the Prevention of Aggression recently prepared model amendments to the Rome Statute, aiming to align the ICC's jurisdiction over the crime of aggression with its jurisdiction over genocide, crimes against humanity, and war crimes. The outcome of these efforts will be seen in the future.⁸¹

The Kampala Amendments to the Rome Statute on the crime of aggression constitute a *sui generis* jurisdictional regime within a *sui generis* jurisdictional regime, particularly in proceedings triggered by States Parties and the Prosecutor *proprio motu*, which is the result of differences in the temporal, personal, and territorial jurisdiction of the court, as well as additional conditions regarding the preconditions for the initiation of proceedings.

First, the difference in temporal jurisdiction, because of which the court has effectively exercised jurisdiction over the crime of aggression only since 17 July 2018. By contrast, for genocide, crimes against humanity, and war crimes, this dates back to 1 July 2002. Second, the narrowing of the personal scope, as the Kampala Amendments have currently been ratified by only 45 States, whereas the Rome Statute has 124 States Parties. Third, jurisdiction based on the territorial principle is also limited in aggression proceedings compared to other core crimes, where Article 15 *bis*(5) states that the ICC has no jurisdiction over offences committed in the territory of a non-State Party (by a national of a State Party). The same provision also narrows the personal scope of the Rome Statute with regard to aggression, as the court cannot exercise jurisdiction over aggression committed by nationals of non-States Parties in the territory of States Parties. In addition to the obvious jurisdictional differences,

81 McDougall, 2024, pp. 1–21.

other specific additional conditions (such as the separate ratification of amendments or the opt-out declarations) must also be considered when initiating aggression proceedings.

However, it is worth noting that this *sui generis* jurisdictional regime is less specific than the other two triggering mechanisms in situations brought before the ICC by the UN Security Council; this is because the only jurisdictional limits that bind the UN Security Council are the 30 ratifications required for activation and the prohibition of retroactivity. The powers of the UN Security Council overthrow the treaty regime of the Rome Statute; in other words, treaty norms bow to the imperative of international peace and security. The ICC's jurisdiction over the crime of aggression appears somewhat simpler (at least at the level of abstraction and legal norms) in relation to proceedings initiated by the UN Security Council than in relation to referrals by States Parties and *proprio motu* prosecutions. Meanwhile, although the normative framework is in place, many practical questions remain obscure, and judicial case-law to guide in these issues is missing. Predicting whether aggression proceedings will be brought before the ICC and, if so, whether this could happen in the foreseeable future, is not a rewarding task for international lawyers; however, the extreme political sensitivity of the crime, the conceptual uncertainties surrounding the use of force and aggression, and the jurisdictional limits built into the Rome Statute imply that the chances of this happening are very slim.

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CHILDREN AND INTERNATIONAL CRIMES: VICTIM VS PERPETRATOR



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Abstract

This chapter analyses the issue of children in the context of international crimes, in which a child may be perceived as a victim or sometimes, unfortunately, a perpetrator. However, it is possible for a child to be simultaneously classified as both perpetrator and victim. Such a situation, from the perspective of law – including international law, ethics and morality – is extremely challenging to assess. Following an introduction outlining the problem, considerations related to the concept of the child are presented in the light of basic legal instruments in Poland, followed by those related to the concept of the child in the light of the basic instruments of international law. The next stage of the analysis covers international crimes from the perspectives of both Polish and international law. All of the above provides a basis for discussing the topic of children as victims and as perpetrators of crimes. These considerations are supported by an overview of court cases before the International Criminal Court (those of Thomas Lubanga Dyilo, Bosco Ntaganda, and Dominic Ongwen). Positive facts will also be presented. Arising from the research conducted, factors influencing the development of child soldiers will be proposed. The chapter concludes with a concise summary.

Keywords: children, international crimes, International Criminal Court, international criminal law, Poland

1. Introduction

Linking children's issues to the problem of crime is not easy as issues relating to children in a state's legal system are usually considered in terms of ensuring their full safety and effective protection from harm or damage. For any state and nation, children are the future and the guarantee of its continuation.

Children are always the epitome of vulnerability and pure goodness and are not normally predisposed to commit crimes, though there are exceptions. The situation is different when it comes to countries where armed conflicts are part of common existence. In these areas of permanent armed conflict – mainly in Africa – children are not necessarily conceived of as embodying the greatest good and the future. There, the hard rules of life place children in non-obvious situations characterised by non-obvious choices. The only law that applies then is the law of life and death (*ius vitae et necis*). The child is then unable – under these extreme conditions – to distinguish an action based on good from an action based on evil in order to save his or her life and the lives of his or her family and loved ones. Consequently, if a child chooses evil to survive, he or she may commit a crime. In countries torn by armed conflicts, law is replaced by force and aggression, and children are often idle tools.

In such a context we see the very complicated situation that arises when dealing with both children and international crimes.¹ This means that in the harsh realities of war, a child may not only be a victim, but also – completely beyond his or her control – a perpetrator of a crime. We, therefore, need to examine the workings of the very complex phenomenon of children's involvement in warfare, in which crime is often one of the daily activities. These two research elements – the child and international crimes – are linked in the title and form the core areas of analysis.

2. The concept of the child in the light of basic legal instruments in Poland

As indicated at the outset, the essential element that distinguishes a child from an adult is age. After all, the type of act committed by a child or an adult may be the same. Whether an act is a crime is determined by the relevant legal regulation. In Poland, based on Article 10 of the Criminal Code,² the minimum age of criminal responsibility is set at 13. From this age, individuals may be held criminally responsible for their acts. Therefore, children under the age of 13 cannot be held criminally responsible for a crime committed, whereas those between the ages of 13 and 17 can

1 See Graf, 2012, pp. 945–969; Amann, 2013, p. 411; Morss, 2004, pp. 213–225; Masło, 2019, pp. 15–26.

2 Act of 6 June 1997 - Criminal Code (Journal of Laws 1997 No. 88 item 553).

be held criminally responsible for their actions under special rules. This is a liability based on completely different principles than those applicable in standard situations where an adult commits a crime. Adults in Poland are liable on the general principle that a person is subject to criminal liability as soon as he or she commits an act prohibited by law after the age of 17.

Although Polish law makes a very precise distinction between an adult and a child in terms of a fixed age limit, there is no legal definition of a child,³ though a number of legal instruments attempt, to a greater or lesser extent, to define this concept. Moreover, there are also a number of legal concepts that are directly or indirectly linked to the concept of a child. In addition, the Polish legislation on this issue frequently refers to the standard of international law, where the notion of the child is recognised.

In the Polish legal system, one of the various legal instruments in which one can find an attempt to define a child is the Ombudsman for Children Act of 6 January 2000.⁴ Pursuant to Article 2 of this Act, a child is defined as every human being from conception to adulthood. On the other hand, the coming of age indicated in this definition is defined in separate regulations, which in Poland are mainly the provisions of the Civil Code.

In the Polish legal system, one may also encounter other notions referring to the concept of a child. One of these is the notion of a “minor”, which is included in the scope of the term “child”. The concept of a minor applies mainly in the area of civil law. The basic legal instrument for Poland’s civil law, already mentioned above in the form of the Civil Code,⁵ indicates that a minor is a person who has not yet reached the age of eighteen. In Poland, the concept of a minor is the opposite of the concept of an adult. Since, according to the Civil Code, an adult is a person over eighteen years of age, a minor is a person under eighteen years of age or who has not married.⁶ Therefore, the Polish Civil Code divides minors into persons who have not reached the age of 13 and persons who have reached the age of 13 but not the age of majority.

Another law, the Act on the support and rehabilitation of minors,⁷ uses the term “underage”.⁸ This Act forms the basis for adjudicating the scope of criminal responsibility specifically in relation to underage persons. The manner in which this law treats an underage person depends on his/her age and the type of proceedings. This means that underage persons are a) those who have reached the age of 10, are not of legal age, and against whom proceedings for demoralisation are being conducted; b) persons against whom criminal proceedings are being conducted for acts they committed after reaching the age of 13 but before reaching the age of 17; c) persons against whom proceedings are being conducted for the execution of educational,

3 Mathews and Collin-Vézina, 2019, pp. 131–148; Olszewski, 2011, pp. 205–216. See also Jarecka-Kowalczyk, 2022, pp. 179–191.

4 Act of 6 January 2000 on the Ombudsman for Children (Journal of Laws 2000 No. 6 item 69).

5 Act of 23 April 1964 - Civil Code (Journal of Laws 1964 No. 16 item 93).

6 Stawniak et al., 2017, p. 139.

7 Act of 9 June 2022 on the support and rehabilitation of minors (Journal of Laws 2022 item 1700).

8 Wielec, 2017, p. 1548.

therapeutic or correctional measures, but no longer than until they reach the age of 21. In addition, the Act defines a criminal act as conduct prohibited by law that constitutes an offence, a fiscal offence, or a misdemeanour. A criminal act is defined as conduct that matches the characteristics specified in the relevant legislation.⁹

A final concept that exists in the criminal law is that of a “juvenile”. This is defined in Article 115 § 10 of the Criminal Code as an offender who is under 21 years of age at the time of committing their criminal act and not yet 24 years of age at the time of adjudication in the first instance.

Based on the above, it is clear that several legal concepts are included in the term “child”. This is important from the point of view of incurring criminal liability for offences. While all these concepts referring to and concerning the term “child” provide for completely different – often less strict – rules of trial for these individuals when it comes to incurring criminal liability, adults (those over 17 years of age) are liable on general principles. This observation is important for the following analysis, as the introduction of these distinctions in relation to age, to the concepts associated with the child, and finally to the specific rules for incurring criminal responsibility is intended to show that a child cannot incur this responsibility to the same extent and based on the same principles as an adult. As adults play a key role in shaping children’s attitudes, it is unlikely that a child could commit a crime entirely independently.

3. The concept of the child in the light of the basic instruments of international law

The concept of the child in international law is fairly well formulated. The primary piece of legislation defining this concept is the 1989 Convention on the Rights of the Child.¹⁰ It is one of the most basic and most important pieces of international legislation containing a fairly detailed concept of the child. For many countries’ legislation, it provides a model for how to understand, describe and use – in legal terms – the concept of the child. For the purposes of this Convention, a “child” means any human being under the age of eighteen years, unless he or she attains the age of majority earlier in accordance with the law relating to the child. The definition of a child presented here implies two age ranges. The first is the generally indicated beginning of a child’s life and the second is the upper limit of coming of age.¹¹ While the question

9 Fic, 2019, pp. 96–108.

10 Convention on the Rights of the Child, adopted by the United Nations General Assembly on 20 November 1989 (Journal of Laws 1991 No. 120 item 526); See: Schulz, 1997, pp. 163–182; Przyborska-Klimczak, 2019, pp. 211–235; Orzeszyna, 2019, pp. 267–273.

11 Korzyński, 2016, p. 15.

of reaching adulthood does not raise any objections, the question of the beginning of a child's life, that is, the lower limit, is no longer so obvious. Nonetheless, it is assumed in Poland that the Convention defines the upper age limit of the child while not referring to the beginning of the child's life. It is left to the individual states who are party to this Convention to determine for themselves from which moment a child becomes a human being.¹²

It is worth noting that the concept of the child is also known to other instruments of international law. It can be found, *inter alia*, in the provisions of the 1996 European Convention on the Exercise of the Rights of the Child,¹³ which applies to children under the age of 18. The purpose of this Convention is to benefit children by granting and promoting their rights, granting them procedural rights and facilitating the exercise of these rights by ensuring that children, either personally or through other persons or institutions, are informed of and entitled to participate in proceedings before a judicial authority that concern them.

Another piece of legislation is the 2000 Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography,¹⁴ which absolutely prohibits trafficking in children, child prostitution and child pornography, and calls for these offences to be punishable under national law with appropriate serious sanctions, taking into account the extremely serious nature of these offences.

A further example is the 1980 Hague Convention on the Civil Aspects of International Child Abduction.¹⁵ Here, the main object is to ensure the prompt return of children wrongfully abducted or retained and to ensure respect for the custody and visitation rights of children in countries that have signed this Convention.

4. International crimes – the Polish perspective

The second element of this analysis is the concept of international crimes.¹⁶ This is a very broad concept.

In this sense, these concepts are generally defined as a group of acts prohibited as crimes, that is, acts of the most serious kind, as defined by international laws.¹⁷

12 Żelichowski, 1997, p. 28.

13 European Convention on the Exercise of the Rights of the Child, drawn up in Strasbourg on 25 January 1996 (Journal of Laws 2000 No. 107 item 1128).

14 Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, adopted in New York on 25 May 2000 (Journal of Laws 2007 No. 76 item 494).

15 Zombory, 2023, pp. 217–237.

16 Gacka, 2021b, pp. 159–194; See: Masło, 202, pp. 347–380.

17 Van der Wilt, 2013, pp. 43–77; Stewart, 2012, pp. 165–219; Bassiouni, 1996, pp. 63–74.

The situation is different in the legal regimes of individual states around the world. While the concept of international crime is not defined in national criminal law regimes (e.g. in Poland),¹⁸ some systems of national criminal law refer to crimes against humanity.

For example, the Polish Criminal Code contains, in the current Criminal Code, Chapter XVI under the title ‘Offences against Peace, Humanity and War Crimes’. At this point, it is worth pointing out for information that the Polish Criminal Code distinguishes between a general part, where the general principles of incurring criminal liability in Poland are presented (e.g. the concept of crime, the age of the perpetrator, circumstances excluding criminal liability, etc.) and a specific part, where a catalogue of individual crimes is provided. It is in this second part that the offences related to international crimes are found: offences such as the crime of initiating a war of aggression, genocide, organising and participating in an attack, using weapons of mass destruction, the manufacture and circulation of prohibited means, violation of the accepted rules or methods of warfare, or mistreatment of prisoners of war or civilians are defined there.

Another interesting provision in the Polish Criminal Code – from the point of view of this analysis – and one that refers directly to international crimes is Article 124. This provision gives the very general ‘other violations of international law’ as constituting a crime. These ‘other violations of international law’ within the meaning of this provision constitute specific acts. This provision stipulates that whoever, in violation of international law, commits any of the following acts shall be punished by imprisonment for a term of 3 to 20 year: a) compels persons to serve in an enemy armed force or to participate in armed actions against their own country; b) inflicts corporal punishment; c) induces a person to engage in sexual activity – including sexual intercourse, submission to another sexual act, or performance of such an act – through violence, unlawful threat or deception; d) commits acts that violate personal dignity, particularly through humiliating and degrading treatment; e) unlawfully deprives a person of liberty; f) deprives a person of the right to an independent and impartial court or restricts their right of defence in criminal proceedings; and g) declares that the rights or claims of citizens of the opposing party are extinguished, suspended or inadmissible before the courts. The same punishment shall be imposed on anyone who, in violation of international law, a) delays the repatriation of prisoners of war or civilians; b) dislocates, resettles or deports civilians; c) conscripts or recruits into the armed forces persons under 18 years of age; or d) actually uses such persons in armed activities.

18 Grzebyk, 2022, p. 10.

5. International crimes – an international perspective

Turning to the field of international law, on the other hand – in the context of international crime or crimes under international law analysed here – it is worth pointing out that a basic catalogue of acts of warfare is generally known there, first adopted in 1907 in the Hague Conventions.¹⁹ However, the basis for comprehensive international liability for crimes under international law was defined later, in 1919 in the Treaty of Versailles.²⁰

Subsequently, the scope of this concept was broadened after the Second World War by, for example, the provisions of the Charter of the International Military Tribunal at Nuremberg.²¹ This refers to Article 6 of this Statute, which defined the types of crimes under international law. The first was ‘Crimes against Peace’, the crimes of planning, preparing, unleashing or waging a war of aggression. The second was war crimes, grave breaches of the laws and customs of war, especially if committed as part of an overall political plan and of a widespread nature. The third was crimes against humanity,²² committed against civilians, both before and during the war, for political, racial or religious motives.²³

Currently, however, the most important legal act defining the scope of crimes under international law is the Rome Statute of the International Criminal Court,²⁴ which not only defines the structure and types of international crimes, but also the rules of operation of this special international body set up to prosecute these types of crimes, which is precisely the said Court. Among other things, one can read in the preamble of this Statute that the States Parties to the Rome Statute decide that

to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole.

Currently, the International Criminal Court is complementary to national criminal justice systems.²⁵ The Court is a permanent institution, and it has the power to exercise jurisdiction over persons who have committed the most serious crimes of international concern listed in this Statute. The Court’s jurisdiction under the Statute of the International Criminal Court covers the following crimes: (a) the

19 Saeid, 2015, p. 37.

20 Niewiada, 2015, p. 103; See: Masło, 2023, pp. 45–49.

21 International Agreement on the Prosecution and Punishment of Major War Criminals of the European Axis, signed in London on 8 August 1945 (Journal of Laws 1947 No. 63 item 367).

22 Masło, 2020, pp. 133–178.

23 Kanarek, 2011, pp. 455–456.

24 Rome Statute of the International Criminal Court, adopted at Rome on 17 July 1998 (Journal of Laws 2003 No. 78 item 708).

25 Kovacs, 2023, p. 135; Kovacs, 2018, p. 225; Kovács, 2017, pp. 343–360; Kovács, 2021, pp. 147–170.

crime of genocide; (b) crimes against humanity; (c) war crimes; and (d) the crime of aggression.

Crimes of genocide²⁶ means any of the following acts committed with the intent of destroying, in whole or in part, a national, ethnic, racial or religious group. This includes: the murder of members of the group; the infliction of serious bodily or mental harm on members of the group; the deliberate creation of conditions of life for the group calculated to cause its physical destruction in whole or in part; the use of measures intended to stop births within the group; and the forced transfer of children of members of the group to another group.

Crimes against humanity²⁷ means any of the following acts, committed as part of a widespread or systematic deliberate attack directed against a civilian population such as: murder or extermination; slavery; deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture, rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilisation and any other form of sexual violence of comparable gravity; persecution of any identifiable group or collectivity for political, racial, national, ethnic, cultural, religious, gender or other reasons generally considered unacceptable under international law; enforced disappearances of persons; the crime of apartheid; and other inhumane acts of a similar nature intentionally causing great suffering or serious harm to the person or to their mental or physical health.

War crimes²⁸ are criminal actions committed in pursuit of a plan or policy or when such crimes are committed on a large scale. For the purposes of the Statute, the term means serious violations of the Geneva Conventions of 12 August 1949, such as: wilful killing, torture or inhuman treatment, including biological experimentation, causing great suffering or grievous bodily or health harm; serious destruction of and damage to property, not justified by military necessity and carried out unlawfully and arbitrarily; forcing prisoners of war or other protected persons to serve in the armed forces of an enemy power; deliberately depriving prisoners of war or other protected persons of their right to a fair trial conducted in the normal course; unlawful deportation or resettlement or unlawful deprivation of liberty; hostage-taking; and other serious violations of the laws and customs of international law applicable to armed conflicts of an international character.

The crime of aggression²⁹ means the planning, preparation, initiation or execution, by a person in a position to exercise effective control over or direction of the political or military action of a state, of an act of aggression which, by its nature, gravity or scale, manifestly violates the Charter of the United Nations.

26 Kress, 2006, pp. 461–502; Lemkin, 1947, pp. 145–151; Travis, 2012, pp. 30–55.

27 May, 2006, pp. 349–352; Sadat, 2013, pp. 334–377; Robinson, 1999, pp. 43–57.

28 Meron, 1998, pp. 462–468; Hagan et al., 2006, pp. 329–349; Frulli, 2001, pp. 329–350.

29 Koh et al., 2015, pp. 257–295; Scharf, 2012, p. 357; Clark, 2009, pp. 707–723.

6. Children as victims

There is no doubt that millions of children in areas of armed conflict are victims of unimaginable atrocities. As noted above, it was for this reason, among others, that, in recognition of the enormity of the situation, states at the Rome Conference committed themselves to establishing the International Criminal Court (hereinafter ICC) for the benefit of present and future generations. One of the ICC organs established was the Office of the Prosecutor of the International Criminal Court (Office of the Prosecutor). This body performs investigative and prosecutorial functions. Since 2003, the ICC Prosecutor's Office has been investigating a number of atrocious crimes against children in countries such as Uganda, the Democratic Republic of the Congo, Sudan, the Central African Republic, Kenya, Libya, the Faroe Islands, Mali, Burundi and Afghanistan. The office is also conducting preliminary investigations into such acts in Bolivia, Colombia, Guinea, the Philippines, Venezuela, Palestine and Nigeria.

In legal terms, the ICC Statute is not passive when it comes to children; an explicit commitment to address crimes against children can be found in many of the Statute's provisions and the word "child" is specifically mentioned on numerous occasions. The Statute's preamble mentions that there is full consciousness

(...) that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time, mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity, recognizing that such grave crimes threaten the peace, security and well-being of the world.

The provisions of Article 6 of the Statute defines the crime of genocide as any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; and (e) forcibly transferring children of the group to another group.

In the provisions of Article 7 of the ICC Statute, enslavement, which is defined as the realisation of some or all of the powers associated with the right of ownership over a human being, is also treated as a crime against humanity and includes the use of such powers in the area of trafficking in human beings, particularly women and children.

Children are also affected by the provisions of Article 8 of the ICC Statute, where war crimes include, inter alia: a) conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities; b) conscripting or enlisting children under the age of fifteen years into

armed forces or groups or using them to participate actively in hostilities; c) crimes that disproportionately affect children, such as the deliberate targeting of buildings used for religious, educational, artistic, scientific or charitable purposes, historical monuments, and hospitals and places where the wounded and sick are gathered, provided they are not military targets.

The ICC Statute also, in the provisions of Article 36 relating to the qualification, nomination and election of judges of this Court, specifies that States Parties, in selecting judges, should take into account the need for ICC judges to have legal expertise in specialised areas, including but not limited to knowledge of violence against women and children.

Article 42 para. 9 of the ICC Statute relates to the functioning of the Office of the Prosecutor. In this context, the Prosecutor appoints advisors with legal expertise in specialised areas, including, *inter alia*, knowledge of sexual and gender-based violence and violence against children.

Similarly, the provisions of Article 54 regulate the duties and powers of the Prosecutor in pre-trial proceedings. It states that the ICC Prosecutor is obliged, *inter alia*, to take appropriate measures to ensure the effectiveness of pretrial proceedings in cases of crimes under the jurisdiction of the Court and, in the performance of his duties in this regard, to respect the interests and take into account the personal circumstances of victims and witnesses, including age, gender (sex) and health, and to take into account the nature of the crime, in particular where it involves sexual, gender (sex) or violence against children.

Another provision, Article 68 of the Statute, regulates the protection of victims and witnesses and the rules for their participation in ICC proceedings. Thus, in turn, the ICC shall take appropriate measures to ensure the safety, physical and mental well-being, dignity and privacy of victims and witnesses. In taking these measures, the Court takes into account all relevant circumstances, including age, gender (sex), health status, and the nature of the crime, especially, but not only, when it concerns sexual or gender (sex)-related violence or violence against children. Such measures apply in particular to victims of sexual violence or a child acting as a victim or witness.

In addition, it is important to note that children – especially, though of course not exclusively, during armed conflict – are vulnerable to sexual and gender-based crimes, which are prohibited by the ICC Statute. The Statute recognises children as persons with individual rights, as members of families and as members of multi-generational communities. This recognition corresponds to the international understanding embodied in the 1989 Convention on the Rights of the Child and many other international instruments, from which it follows that children are vulnerable and entitled to special care and protection and that their interests, rights and personal circumstances should be given due consideration.

7. Children as perpetrators of crimes

The concepts of victim and perpetrator of a crime seem to be easily distinguishable under normal operating conditions. However, it is not so easy in the case of children living in areas of permanent armed conflict. When hearing about war, our first thought is to protect children, as they are defenceless and dependent on the decisions of adults. On the other hand, it should be pointed out that – unfortunately – a child, due to a combination of different events, the influence of the situation created, the existence of various dependencies, meeting the wrong people or, finally, the influence of a psychological factor, can sometimes be not only a victim but also a perpetrator of crimes during warfare. He can also be both perpetrator and victim of a crime at the same time. And finally, he may also evolve to be only a perpetrator. For a defenceless child to become a victim and later a perpetrator of crimes is not a commonplace happening. Nevertheless, factors of war, the desire to live, and the need for a sense of security can bring about an extraordinary evolution whereby a child becomes first a victim and then possibly a criminal.

Such an unlikely evolution is particularly evident in countries on the African continent, the area most often gripped by the elements of war and destruction, making it possible for the victims of crime, in time, to become perpetrators. This observation particularly applies to children who have been forcibly drawn into warfare. These enlisted children then become elements of a war machine geared to aggression and the elimination of the enemy, whoever that enemy may be, and by every means possible – including the use of children in warfare. This terrible assumption unfortunately leads to a blurring of the distinction between good and evil.

Our tendency is to associate children with goodness, love, friendliness, the future and sincerity. Among other things, it was Pope John Paul II who pointed out in a speech at Castel Gandolfo that ‘The child is a source of hope. It tells the parents the purpose of their life, it represents the fruit of their love. It also makes it possible to think about the future’.³⁰ The child is, after all, good by nature, but as a *tabula rasa*, is influenced by the adults around it. These patterns that are passed on to children from adults during armed conflicts may not be positive. On the contrary, they may make these innocent children active and legitimate participants in armed conflicts. Then the distinction between perpetrator and victim in each case becomes quite blurred. Therefore, the responsibility attached to adults who, in the name of the interests of war – in this case – take advantage of a dramatic situation by leading children into armed conflict is very high.

In the world of war, the child is often a tool that can be used objectively for the cruellest actions. In a normal world, a child should be surrounded by goodness and love. In the world of war, there is a different hierarchy of values. There, traits such as anger, helplessness, desperation and pain are the standard. Children in war are

30 <https://p84.lublin.eu/2020/06/21/najwazniejsze-slowa-wypowiedziane-przez-papieza-jana-pawla-ii/> [accessed on: 29 January 2024].

children without school, without toys, without family, without joy. They are, in fact, little adults. They are children who have had to grow up quickly while holding a rifle in their hands, shooting, planning attacks, and getting killed.

Publicly available data shows that many cases involving children as perpetrators of crimes during warfare have been observed. This is mainly the case in the countries previously mentioned, where warfare is a daily occurrence, and in many cases violence and torture are used to compel children to fight. According to UN data, more than 300,000 children under the age of 18 in more than 30 countries are actively involved in armed conflict.³¹ For example, more than half of all soldiers in the civil war in Sierra Leone in 1999 were under the age of 18.³² From 1985 to the present, at least 12,000 children have been kidnapped by the Lord's Resistance Army in Northern Uganda. In Colombia, up to 30% of children are routinely recruited into guerrilla and paramilitary groups.³³

It is in this light that the concept of "child soldiers" has been coined, a term for which several different definitions exist. The concept of "child soldiers" was included in an international document created at the conference of the United Nations Children's Fund in Cape Town held from 27 to 30 April 1997. This conference, through a document entitled 'Cape Town Principles and Best Practises', addressed the prevention of the recruitment of children into the armed forces and the demobilisation and social reintegration of child soldiers in Africa. It defines the term "child soldier" as broadly covering any person under the age of eighteen who is a member of any regular or irregular armed force or armed group, in any capacity, including, inter alia, as cooks, baggage handlers, messengers or any other person accompanying such groups, but excluding only family members. The definition above also applies to girls recruited for sexual purposes and forced marriage. It is emphasised, however, that this definition is purely programmatic, lacking the force of law.³⁴

Another definition is found in a document called 'Child Soldiers Report' from the Coalition to Stop the Use of Child Soldiers. Here, a child soldier is considered to be

*a person under the age of eighteen who is a member of or has been conscripted into an armed force or armed group during an ongoing armed conflict or in peacetime. Child soldiers may perform tasks ranging from direct participation in combat to military activities such as reconnaissance, spying, sabotage, booby-trapping, messing, sentry or protection, training, drill and other types of combat preparation; they also perform functions such as transporting baggage, running a farm, sex slavery or performing forced labour.*³⁵

31 <https://www.unic.un.org.pl/rozbrojenie/dzieci-zolnierze.php> [accessed on: 29 January 2024].

32 Shepler, 2005, pp. 197–211.

33 <https://www.unic.un.org.pl/rozbrojenie/dzieci-zolnierze.php> [accessed on: 29 January 2024]; Hurtado et al., 2023, pp. 65–91.

34 Prucnal, 2012, p. 39.

35 Boratyńska, 2013, p. 43; <http://hdl.handle.net/11320/14047> [accessed on: 29 January 2024].

The prototypes for the legal treatment of the problem of the child in armed conflict, however, are the Protocols additional to the Geneva Convention of 1949. Among these we find the 1977 Protocols Additional for the Protection of Victims of International Armed Conflicts, where in Chapter II, entitled 'Actions for the Benefit of Women and Children', there are a number of guarantees concerning children. The provisions of Article 77 set out the protection of children.³⁶ According to these provisions, children should enjoy special respect and be protected from all forms of assault on their morals. The parties to the conflict will give them the care and assistance they need because of their age or for any other reason. The parties to the conflict will take all practicable steps to ensure that children under the age of 15 do not participate directly in hostilities; in particular, they will refrain from inducting them into their armed forces. If persons between 15 and 18 years of age are called up, the parties will endeavour to give preference to the older ones. If, in exceptional cases and contrary to the provisions indicated above, children under 15 years of age take direct part in hostilities and find themselves in the power of the opposing party, they will continue to enjoy the special protection granted, whether or not they are prisoners of war. In the event of detention, imprisonment or internment for reasons related to the armed conflict, children will be kept in accommodation separate from that occupied by adults, except where families are placed together. The death penalty for an offence related to the armed conflict shall not be enforced against persons who were under 18 years of age at the time of the offence.

The same is true of the content of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts of Geneva of 8 June 1977. The provisions of Article 4 of this Protocol set out basic guarantees for the care and assistance the child needs. In particular: (a) they shall receive an education, including religious and moral education, in keeping with the wishes of their parents, or in the absence of parents, of those responsible for their care; (b) all appropriate steps shall be taken to facilitate the reunion of families temporarily separated; (c) children who have not attained the age of fifteen years shall neither be recruited into the armed forces or groups nor allowed to take part in hostilities; (d) the special protection provided by this Article to children who have not attained the age of fifteen years shall remain applicable to them if they take a direct part in hostilities despite the provisions of sub-paragraph (c) and are captured; and (e) measures shall be taken, if necessary, and whenever possible with the consent of their parents or persons who by law or custom are primarily responsible for their care, to remove children temporarily from the area in which hostilities are taking place to a safer area within the country and ensure that they are accompanied by persons responsible for their safety and well-being.

Another legal regulation containing references to the concept of the child in armed conflict is the aforementioned Convention on the Rights of the Child, which, in Article 38, sets out situations and rules of conduct for children in war:

³⁶ Nowakowska-Małusecka, 2010, p. 130.

(i) States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.

(ii) States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.

(iii) States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest. 4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.

An interesting document in the context analysed here is the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, adopted in New York on 25 May 2000. According to Article 3 of this Protocol, States Parties to this Protocol, shall raise the minimum age limit for the voluntary entry of persons into their national armed forces from the limit set by – as indicated above – Article 38(3) of the Convention on the Rights of the Child, taking into account the principles contained in that Article and recognising that, under the Convention, persons under the age of 18 are entitled to special protection. It further indicates that each State Party shall, at the time of ratification of or accession to this Protocol, make a binding declaration specifying the minimum permissible age for voluntary enlistment in its national armed forces, together with a description of the safeguards adopted to ensure that such recruitment is not carried out by force or coercion. In addition, States Parties permitting voluntary enlistment in their national armed forces of persons under the age of 18 shall maintain safeguards to ensure, at a minimum, that: a) such enlistment is genuinely voluntary; b) such recruitment is done with the informed consent of the person's parents or legal guardians; c) such persons are fully informed of the duties involved in such military service; and d) such persons provide reliable proof of age prior to acceptance into national military service.

In the next document, the 1990 African Charter on the Rights and Welfare of the Child, the provisions of Article 22, entitled 'Armed Conflicts', mentions that the States Parties to the present Charter undertake to respect and ensure respect for the norms of international humanitarian law applicable in armed conflicts involving the child. States Parties to the present Charter shall take all necessary measures to ensure that no child takes direct part in hostilities and, in particular, shall refrain from recruiting any child. States Parties to the present Charter, in accordance with their obligations under international humanitarian law, shall protect civilians in armed conflicts and shall take all possible measures to ensure the protection and care of children affected by armed conflicts.

8. Case studies – a general overview

8.1. Thomas Lubanga Dyilo

One of the most important cases relating to the issue of child soldiers before the ICC was that concerning the situation in the Democratic Republic of Congo. The accused before the ICC was Thomas Lubanga Dyilo, former president of the *Union des Patriotes Congolais/Forces Patriotiques pour la Libération du Congo* (UPC/FPLC), first arrested in March 2006. The subject matter of the case concerned a number of offences of enlisting and conscripting children under the age of 15 and using them to participate in hostilities. In 2012, the ICC handed down a verdict of guilty and he was sentenced on 10 July 2012 to a total of 14 years' imprisonment, confirmed by the second instance of the ICC (Appeals Chamber) on 1 December 2014. Following further review proceedings, Lubanga was transferred to a penitentiary unit in the Democratic Republic of Congo on 19 December 2015 to serve the remainder of his prison sentence. He was released on 15 March 2020 after serving 14 years of imprisonment. By contrast, the proceedings for victim reparations began on 7 August 2012.³⁷ There is no doubt that the verdict in the Lubanga case – one of the first to address the issue of child soldiers – was a landmark decision, highlighting the need for urgent and concrete action to curb the problem. The final outcome of the case sent a clear message around the world that the use of child soldiers is totally unacceptable and perpetrators must be held accountable.

8.2. Bosco Ntaganda

Another historically important proceeding before the ICC on the issue of child soldiers was the case against Bosco Ntaganda,³⁸ Congolese deputy chief of staff and commander of the *FPLC*. He was charged with 13 counts of war crimes and five counts of crimes against humanity committed between 2002 and 2003 in the Ituri district of the Democratic Republic of Congo. The charges included the most serious crimes, such as murder, rape, sexual slavery, recruitment of child soldiers, persecution, forcible deportation, looting and carrying out attacks directly targeting civilians. On 8 July 2019, the ICC's Sixth Arbitral Chamber found Bosco Ntaganda guilty beyond reasonable doubt of 18 war crimes and crimes against humanity committed in Ituri, Democratic Republic of Congo, between 2002 and 2003 and he was sentenced on 7 November 2019 to a total sentence of 30 years' imprisonment. On 30 March 2021, the ICC Appeals Chamber upheld the conviction of the case. These two decisions are now final.³⁹ This case marks the first time in the history of international criminal law,

³⁷ <https://www.icc-cpi.int/drc/lubanga> [accessed on: 29 January 2024].

³⁸ Gacka, 2021a, p. 218.

³⁹ <https://www.icc-cpi.int/drc/ntaganda> [accessed on: 29 January 2024].

and indeed international humanitarian law, that ICC judges have handed down a conviction for sexual violence committed by perpetrators against members of their own armed group and the 30-year sentence is one of the harshest sentences handed down since the ICC began operating. It should be noted that Ntaganda has consistently maintained his innocence, arguing that he is a ‘revolutionary, not a criminal’.⁴⁰ The conviction opened the way for some 2,123 of his victims to seek compensation for the harm they suffered as a result of Ntaganda’s criminal actions.

8.3. Dominic Ongwen

The most notorious case before the ICC concerning child soldiers as victims and perpetrators of international crimes was the case against Domenic Ongwen.⁴¹ The proceedings in this case are an exemplary instance of the impact of devastating factors on human life, as a result of which a person becomes a ruthless criminal. These proceedings before the ICC – and indeed Ongwen’s life story – demonstrate how easily, in the context of the realities of war, the status of victim can transform over time, first into that of victim-perpetrator and then directly to cruel perpetrator. It is widely reported that the origins of Ongwen’s criminal activities in Uganda began when he was kidnapped and recruited by the Lord’s Resistance Army (LRA), a group active in Uganda since the 1980s. By contrast, as part of the ICC proceedings, Ongwen’s case goes back only as far as 2005, when arrest warrants were issued for LRA leaders. However, only one of them – Ongwen – ended up before the Court. This trial took place in 2015. Among the charges of war crimes and crimes against humanity brought against Ongwen were those acts that directly related to his personal involvement in the unlawful recruitment of child soldiers into the ranks of the LRA, meaning that Ongwen committed the same acts that he himself was once a victim of. The ICC at first instance (Trial Chamber IX) found Ongwen guilty of a total of 61 crimes, including crimes against humanity and war crimes, committed in Northern Uganda between 1 July 2002 and 31 December 2005. These crimes included attacks on civilians, murder, attempted murder, torture, enslavement, insult to personal dignity, violation of personal dignity, looting, destruction of property, forced marriage, rape, sexual slavery, enslavement, forced pregnancy, and the crime of conscripting children under the age of 15 and making them participate actively in hostilities and many other atrocities.

On 6 May 2021, Trial Chamber IX sentenced Ongwen to 25 years in prison. This verdict and sentence was affirmed by the Appeals Chamber on 15 December 2022. On 18 December 2023, Ongwen was transferred to Norway to serve his prison sentence⁴² and the proceedings against him are now considered complete and the

40 <https://www.dw.com/pl/haga-bosco-ntaganda-terminator-skazany-na-30-lat/a-51158374> [accessed on: 29 January 2024].

41 Gacka, 2020, pp. 78–100.

42 <https://www.icc-cpi.int/uganda/ongwen> [accessed on: 29 January 2024].

sentences imposed final. Approximately 4,095 victims participated in the proceedings.⁴³ However, only the partial stage concerning the award of compensation to Ongwen's victims is currently ongoing.

For additional detail, in its February 2021 judgment, the Court found Ongwen guilty of the majority of the charges against him (62 out of 70 charges). He was found guilty beyond reasonable doubt of crimes described as war crimes and crimes against humanity committed in Uganda between 1 July 2002 and 31 December 2005. The crimes for which he was criminally responsible are, in particular: *first*, attacks on civilians as such, killings, attempted killings, torture, enslavement, insults to personal dignity; *second*, attacks on civilians as such, killings, attempted killings, torture, enslavement, insults to personal dignity, looting, destruction of property and persecution; committed in the context of four specific attacks on internally displaced persons camps; *third*, sexual and gender crimes, namely forced marriage, torture, rape, sexual slavery, enslavement, forced pregnancy and violations of personal dignity, committed against seven women (whose names and individual stories are detailed in the sentence) who were abducted and placed in his household; *fourth*, a number of further sexual and gender-based offences committed by him against girls and women in the Sinia brigade, namely forced marriage, torture, rape, sexual slavery and enslavement; *fifth*, the offence of conscripting children under the age of 15 into the Sinia brigade and using them to actively participate in hostilities. warfare. It is also important to note that the so-called argument from original victimisation, i.e. the fact that Ongwen was in fact a victim and not a perpetrator, was not accepted by the Court. The Court also did not find that there were other circumstances excluding criminal responsibility in this case (such as mental illness).

9. Child soldiers - positive facts

Although the issue of child soldiers arouses negative emotions, it is worth mentioning that in the history of armed conflicts around the world one can find extremely positive assessments of this phenomenon. One of them originates from the history of the Second World War and concerns the legendary participation of children in Poland's Warsaw Uprising.⁴⁴

Of course, the analysis indicated below cannot be compared to the current involvement of child soldiers in current armed conflicts, especially on the African continent. In these conflicts, children are used deliberately as an instrument of crime. The scale and circumstances prevailing during the Second World War were completely different, as were the reasons for the participation of children in the fighting.

⁴³ Gacka, 2021a, p. 217.

⁴⁴ <https://www.1944.pl/> [accessed on: 29 January 2024].

The fact that the involvement of children during the Warsaw Uprising gained enormous fame and was seen as an honourable action is worthy of note.⁴⁵ Sources indicate that between 900,000 and 1,100,000 people lived in occupied Warsaw in August 1944. By the end of October, some 180,000 of them had died at the hands of the Germans. Among the 45,000 insurgents were 2,912 eighteen-year-olds, 5,840 children aged between ten and seventeen, and others even younger.⁴⁶ The historical literature contains many vivid accounts of that terrible time, according to which

*(...) The poorest were the small children, intimidated, so often very hungry and not understanding why such terrible things were happening around them. I felt so sorry for these children... With older children it was often different. Many took a direct part in the war effort in the Warsaw Uprising. As messengers they carried weapons, reports, orders and the press with enthusiasm. Often these children were unaware of the danger and were therefore often prone to bravado.*⁴⁷

However, it is necessary to emphasise that the children who participated in the Warsaw Uprising were not soldiers in the same sense as those children fighting in armed conflicts on the African continent. The children during the Warsaw Uprising were not forced into warfare and did not take up arms but performed auxiliary functions. The Scout Field Mail was legendary for passing on and delivering important information, for example, letters and parcels to the various insurgent posts. These children did not murder or display violent behaviour. They were not manipulated by the military, nor were they specially trained to do so, nor were they forcibly conscripted into the ranks of professional soldiers. On many occasions, risking their lives, out of a pure need to fight for their homeland, invaded by brutal Germans, they provided assistance to fighting soldiers, often risking their lives, as even for a child capture by the Germans while carrying a parcel or letter was tantamount to a death sentence.⁴⁸ In Poland, the issue of children fighting in the Warsaw Uprising has the dimensions of a legend and is an example of exceptional self-sacrifice for the fatherland.

It is also worth mentioning that in Poland, in Warsaw's Old Town, there is a famous monument – the monument to the Little Insurgent – which symbolises the sacrifice of the children involved in the Warsaw Uprising.⁴⁹ However, there is no doubt that the assessment of children's involvement in the war effort during the

45 <https://kultura.gazetaprawna.pl/artykuly/1424469,powstanie-warszawskie-1944-dzieci.html> [accessed on: 29 January 2024].

46 <https://ciekawostkihistoryczne.pl/2021/05/22/mali-zolnierze-ile-dzieci-walczylo-w-powstaniu-warszawskim/> [accessed on: 29 January 2024].

47 Davies, 2004, p. 395.

48 <https://ipn.gov.pl/pl/aktualnosci/41192,Powstanie-Warszawskie-boj-o-wolna-Polske.html> [accessed on: 29 January 2024].

49 <https://www.polska-zbrojna.pl/home/www/85?t=Pamieci-najmlodszych-powstancow> [accessed on: 29 January 2024].

Warsaw Uprising in Poland is unequivocally positive. The participation of young insurgents is an expression of supreme sacrifice, heroism and patriotic attitude.

10. Factors influencing the development of child soldiers

Currently, the participation of children in armed conflicts – on the African continent, and elsewhere – as child soldiers is not due to a voluntary decision by the child. By nature, children are oriented towards wellbeing and learning about the world. It is through learning about the world, through the existing conditions of the child's life, through the influence of educational factors and methods, that the child becomes a defined individual with a full set of values to help them make certain decisions. Therefore, before becoming a soldier, the child must be subjected to factors that will cause them to adopt an attitude that permits the creation of a child soldier.⁵⁰

The first such factor is the emotional state of children. There is no doubt that children, due to their emotional and physical immaturity, are easy targets for manipulation because they are too young to resist or understand what is really going on around them.

The second factor is poverty. It is not insignificant that the phenomenon of child soldiers occurs in extremely poor countries. Children are most likely to become child soldiers if they are poor, separated from their families, displaced from their homes, living in a war zone or have limited access to education.

The third factor is the survival factor, which can be described as the will to survive. Many children join armed groups because of economic or social pressure, or because they believe that the group will provide them with food or security.

The fourth factor is violence. Many children are forced to join the ranks of child soldier military units. Under the influence of violence, they are subjected to military training, to the regime of military life, and – through violence – their absolute obedience to those in charge of the group is shaped.

The fifth factor is the lack of education. Education in poor countries, especially war-torn ones, is very difficult. The lack of schools and educational resources does not make it easier. Friendship are often established in schools and their absence eliminates this type of relationship. Therefore, the lack of education, the lack of friendly relationships and the lack of opportunities to grow up with friends causes children to choose the army where they can be among their peers.

The sixth factor is technological progress, which is normally a positive factor. However, in this case, technological progress relates to the handling and use of weapons. Nowadays, anyone – even children or others not very familiar with weapons – can handle them very easily. The next step is to convince the child how easy it is to use the weapon.

50 Dudenhoefer, 2016, pp. 45–53.

11. Summary

In summary, it is unfortunately the case that a connection between children and international crimes is possible. Undoubtedly – given the irreparable damage caused to children during such conflicts – the international community must redouble its efforts to prevent crimes against children. There must also be an active and effective system to combat them.

Some positive signs can already be seen. One good example of this cooperation is the adoption on 25 May 2000 by the United Nations General Assembly of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict.⁵¹ This document has been ratified by 159 countries around the world. Since 2002, the day commemorating the Protocol's entry into force, 12 February, has been celebrated as the International Day of Child Soldiers to remind the world of this problem.

Another good example is the formation in June of the Coalition to Stop the Use of Child Soldiers, established by six international, non-governmental human rights organisations, including Amnesty International and Human Rights Watch.⁵² Over time, regional and national human rights institutions have become involved in its development.

A worldwide legal regulation explicitly prohibiting the recruitment of children into the army and the participation of children in armed conflicts as soldiers is also a very important demand. The age should absolutely be set at the age of majority, that is, 18. Anything under the age of 18 should be prohibited. This ensures that people are properly aware of the decision they are making. Any involvement by a person under the age of eighteen is unreliable and dangerous.

However, the most important issue here is the effectiveness of the bodies applying the law,⁵³ including of course the ICC. Despite clear and overwhelming evidence of multiple crimes, the Ongwen case mentioned here lasted 8 years, and issues related to reparations still remain to be finalised. There seems to have been the Special Court for Sierra Leone in the past, which was probably more effective than the current ICC in that it also dealt with the issue of the involvement of child soldiers in armed conflict.⁵⁴ It concerned the organisation of Charles Taylor, who was convicted by Court of genocide, cruelty to civilians, the practice of slavery, and the forced recruitment of children into the army. There is an overwhelming need to ensure efficient cooperation and to speed up and simplify the ICC's procedures so that a simple and clear message is transmitted to and received by all that the accused state and the citizens of that state, those guilty of such terrible crimes against

51 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, adopted in New York on 25 May 2000 (Journal of Laws 2007 No. 91 item 608).

52 <https://www.unic.un.org.pl/rozbrojenie/dzieci-zolnierze.php> [accessed on: 29 January 2024].

53 As an aside, mention may also be made of cybercrime, which manifests its own peculiarities. See Karski and Oręziak, 2021, pp. 55–69; Oręziak, 2020, pp. 187–196; Oręziak, 2019.

54 Kovacs, 2023, p. 121.

children, have been convicted. In addition, there is a need for general education and a broadening of public awareness about situations involving the ruthless abuse of children in armed conflicts as child soldiers.

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UNDERSTANDING THE INTERNATIONAL
CRIMINAL LAW OF TOMORROW
WHEN SERIOUS AND WIDESPREAD
CORRUPTION THAT VIOLATES HUMAN RIGHTS
SHOULD BE SEEN AS CRIMES AGAINST
HUMANITY AT THE INTERNATIONAL LEVEL



SUNČANA ROKSANDIĆ

Abstract

It is recognised that challenges for international criminal law ‘go far beyond armed conflict’.¹ The international community provided the legal answer by creating a crime that protects against serious, widespread and long-term violations of human rights committed by a variety of actions and attacks and that threaten the human dignity of individuals and humanity as a whole – crimes against humanity.² Acts considered crimes against humanity are capable of long-term and widespread human rights infringement, thereby endangering the peace, security and well-being of the world. The category of

- 1 See more in Engelhart & Roksandić, 2021. The research conducted by this author for this joint article and the conclusions thereof are among the main sources for this article. The author is using both structure and text similar to that used in this joint paper. The main ideas concerning the prosecution of serious economic crimes come from a PhD thesis, later published as a book: Roksandić Vidlička, 2017.
- 2 For the origin of the term, see in Sands, 2017.

Sunčana Roksandić (2025) ‘Understanding the International Criminal Law of Tomorrow. When Serious and Widespread Corruption that Violates Human Rights Should Be Seen as Crimes Against Humanity at the International Level’. In: Nóra Béres (ed.) *The ICC at 25: Lessons Learnt*, pp. 261–278. Miskolc–Budapest, Central European Academic Publishing.

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crimes against humanity empowers the international community with a tool to respond to the gravest violations of human rights.³

However, of particular global concern, according to the author, should be that serious economic crimes (systematic and large-scale corruption) and deprivation of essential medicine and health care, as well as environmental crimes⁴ are not yet seen as crimes against humanity although elements of Article 7(1) (k) of the International Criminal Court's Statute offer the possibility of such an interpretation. Many claim that economic and social rights have often been neglected in terms of the protection offered by international criminal law.⁵

In this article,⁶ the author builds upon her previous research and texts which are used throughout this contribution, and provides, primarily for the scientific and expert community of Central European countries, her main arguments already published *in extenso*. The author is of the opinion that construction of crimes against humanity in today's realities should be discussed more (with pro and contra arguments) in Central Europe. The conference *The ICC at 25: Lessons Learnt, Might Have Been Learnt and Unlearnt* provided a platform for the exchange of ideas among scholars and experts in Central Europe. The author was invited to present her research to this conference, thereby opening up the topic for the discussion in the region.

This contribution provides key legal arguments in a concise manner for the international criminalisation of serious and widespread crimes involving corruption as crimes against humanity.

Keywords: Economic crimes, serious and widespread corruption, UNCAC, International Criminal Court (ICC), crimes against humanity

1. Main idea⁷

As emphasised almost in all international criminal law textbooks,⁸ and repeated in Engelhart & Roksandić, international criminal law has concentrated on large-scale atrocities against human beings in the last decades, resulting in an essential codification in the Statute of the International Criminal Court (hereinafter: ICCSt).⁹ The

3 Roksandić Vidlička, 2020, pp. 141–168.

4 For this argument, see Engelhart & Roksandić, 2021.

5 See Schmid, 2016, p. 22.

6 See footnote 1.

7 Based on Engelhart & Roksandić, 2021.

8 Ibid., p. 261.

9 The Statute of the International Criminal Court, A/CONF.183/9 of 17 July 1998 as corrected and amended.

category of crimes against humanity empowers the international community with a tool to respond to the gravest violations of human rights. However, many (including the author) claim that in comparison to civil and political rights, economic and social rights have often been neglected in terms of the protection offered by international criminal law, particularly through the understanding and existing interpretation of crimes against humanity. Many scholars, NGOs and states are aware of the ICC's downsides, but also its advantages: 'the ICC will not put an end to the atrocities which continue to shock the conscience of humanity. However, with the support, it can deter some of the worst crimes and help uphold stability and the rule of law'.¹⁰

Other serious threats to the international community, like systemic corruption or environmental crimes that lead to large-scale violations of human rights, have not yet been the focus of international criminal law, although their impact on societies, on individuals and (especially in the case of environmental damage) on all mankind is no less grave.¹¹ The same holds true for other violations of social rights, like systemic deprivation of access to essential medicine and medical care. Human rights are indivisible.¹²

Serious environmental and economic crimes, including crimes involving corruption as proscribed in the UN Convention against Corruption, violate all human rights, including economic, social and environmental rights.¹³

The main theme of this contribution is that the shift in global politics, understanding the notion of security as human security and the existence of widely accepted and ratified international instruments such as the UN Convention against Corruption (hereinafter: UNCAC) and UN Convention Against Transnational Organized Crimes (hereinafter: UNTOC), together with the development of human rights as indivisible rights, calls for a redefinition and/or shift in understanding and interpreting provisions of crimes against humanity to include serious crimes involving corruption as inhumane acts of a similar character, intentionally causing great suffering or serious injury to body or to mental or physical health, as defined in Article 7(1)k of the Statute of the International Criminal Court.

Human rights law has developed and economic, social and cultural rights are widely recognised, as well its indivisibility.¹⁴ Crimes involving corruption are listed in the UNCAC¹⁵ and the importance of the UN Guiding Principles on Business and Human Rights should also not be underestimated.¹⁶ In addition to these, organised

10 Kirsch, 2008.

11 Roksandić Vidlička, 2017, as cited in Engelhart & Roksandić, 2021.

12 Laplante, 2007.

13 See more in Engelhart & Roksandić, 2021, and in Ziccardi Capaldo, 2018.

14 See generally Vasilka, 2021.

15 UN Convention against Corruption, adopted by the UN General Assembly: 31 October 2003, by Resolution 58/4 (entry into force 14 December 2005), 190 State Parties <https://www.unodc.org/unodc/en/corruption/uncac.html>.

16 The UN Guiding Principles on Business and Human Rights, endorsed by the Human Rights Council in its resolution 17/4 of 16 June 2021.

crime – which could also serve as an enabler and facilitator of core crimes – is addressed in the UNTOC.¹⁷ However, there is no overall international criminal framework for the most serious of such crimes.¹⁸

Recommendations 46-47 of the Oslo Outcome Statement on Corruption involving Vast Quantities of Assets¹⁹ (14 June 2019) call on experts to conduct analysis and explore ideas that contribute to a solution of these issues, for example, the establishment of regional mechanisms for prosecution, or international mechanisms – such as an international anti-corruption court²⁰ with respect for the sovereignty of states; the establishment of an international special rapporteur for anti-corruption; the development of a protocol to the UNCAC on Corruption involving Vast Quantities of Assets (hereinafter: VQA) and exploring the possibility of extending the jurisdiction of the ICC to include corruption involving VQA.²¹

As underlined by Ryngaert in 2022, ‘Momentum is building globally for the establishment of an international anti-corruption court, which would have jurisdiction over acts of grand corruption and fill the domestic accountability vacuum in kleptocratic regimes’.²² However, this author is of the opinion that current and existing legal mechanisms should be strengthened and existing international courts should be used also to prosecute serious and widespread crimes involving corruption. In addition, and on both a national and an international level, crimes against humanity with its open clause ‘other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health’ should be interpreted to include crimes involving corruption as defined by the UNCAC, as well as ecocide and other serious violations of economic and social rights, when they reach the needed threshold, for example, systemic deprivation of access to essential medicine and medical care. “Ecocide” could be defined as unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts.²³

17 United Nations Convention against Transnational Organized Crime and the Protocols, adopted by the UN General Assembly on 15 November 2000, by Resolution 55/23, entry into force 29 September 2003. State Parties: 190, <https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html>.

18 Roksandić Vidlička, 2017.

19 Oslo Statement on Corruption involving Vast Quantities of Assets, 14 June 2019, Oslo, Norway.

20 Wolf, 2014. pp. 1–15.

21 Emphasis by the author.

22 Briefing - Ryngaert, C. 2022. This Briefing identifies key issues which the European Parliament should assess and consider when forming its position. However, as emphasised by Ryngaert: ‘irrespective of its support for an International Anti-Corruption Court, the European Parliament may also want to strengthen other mechanisms enhancing legal accountability, such as existing international courts or extraterritorial jurisdiction. It may also continue to promote more indirect tools for advancing the fight against impunity such as anti-corruption clauses in trade agreements, targeted sanctions, and global asset recovery’.

23 Stop Ecocide International, The independent expert panel for the legal definition of ecocide <https://www.stopecocide.earth/legal-definition>.

2. Understanding corruption as a threat to stability and development

As emphasised in Engelhart & Roksandić:²⁴

Responses to globalisation – especially those following the COVID-19 pandemic – that stressed the importance of protecting health rights, are having a significant effect on international law and institutions that seek to protect economic and social human rights,²⁵ human security and human dignity.²⁶ It is also clear today that as well as being driven by ideology, armed conflicts are largely driven by the potential for financial enrichment.²⁷ Hence, economic violence occurs in every conflict. For Sharp, the notion of economic violence presents the discourse on violations occurring in transitional periods. Economic violence within the transitional justice discourse²⁸ includes, but is not limited to, violations of economic and social rights, corruption and the plundering of natural resources.²⁹ Policies and practices in the field of transitional justice demonstrate that corruption can lead to conflict as a result of the illegal exploitation of natural resources and other forms of organised crime.³⁰ These destabilising activities can both cause and sustain conflict. They often continue to be present after a conflict formally ends, preventing the attainment of sustainable peace and possibly even leading to the conflict being resumed.³¹ It is also widely recognised today that crimes against humanity can be committed both during an armed conflict and also in peacetime.

When addressing this topic, it is also crucial to emphasise, as the author has done in her previous individual and joint publications, that addressing corruption and bribery in all their forms and in a significant way is one of the areas targeted by the 2030 Sustainable Development Goal (SDG) 16³² (on Peace, Justice and Strong Institutions). In the same vein, the recovery of assets stolen through corruption remains high on the global agenda and is mentioned in SDG 16 (16.4). The SDG are a call for action by all countries – poor, rich and middle-income – to promote prosperity while protecting the planet. They recognise that ending poverty must go hand-in-hand with strategies that build economic growth and address a range of social needs,

24 Englehart & Roksandić, 2021, including sources.

25 See for example Shelton, 2002.

26 See for example regarding the concept of human security, Human Development Report Matwijkiw & Matwijkiw, 2017.

27 See for example on this topic, Brunnschweiler & Bulte, 2009; Wisner, 2018.

28 Sharp, 2014, pp. 2–3.

29 Ibid.

30 See more on the topic in UNODC, Anti-corruption module series, particularly Module 11: Corruption, peace and security.

31 See Rose-Ackerman, 2008.

32 Sustainable Development Goals (SDG) for 2030.

including education, health, social protection and job opportunities, while tackling climate change and ensuring protection of the environment.³³

Although the connection between corruption, peace and security seems obvious today, it took the international community a while to achieve a global political consensus on this issue.³⁴ At the United Nations Security Council's First-Ever Meeting on Corruption in 2018,³⁵ United Nations Secretary-General António Guterres emphasised that 'corruption breeds disillusion with government and governance and is often at the root of political dysfunction and social disunity'. He also noted that corruption is closely intertwined with other forms of instability, such as illicit trafficking in arms, drugs and people, terrorism and violent extremism.³⁶ In-depth research on corruption conducted by the Global Initiative against Transnational Organized Crime in the Western Balkans³⁷ confirmed that organised corruption flourishes and sometimes includes elements of state capture.³⁸

Also, as proclaimed by the International Chamber of Commerce, the new Rules on Combating Corruption (2023) constitute the cornerstone of the Chamber of Commerce's anti-corruption work, serving both as a tool for self-regulation by business and as a roadmap for governments in their efforts to fight extortion and bribery.³⁹

3. Defining crimes involving corruption and following the principle of legality

There is no universally accepted definition of crimes involving corruption or international economic crimes,⁴⁰ but it also leaves room for choosing the most appropriate definitions of economic offence(s) in correspondence with the contemporary world order, to serve as the core international offence standards that at the same time protect human rights, primarily ESC rights as well as 'peace, security and the well-being of the world'.⁴¹

33 Ibid., as cited in Engelhart & Roksandić. For more, particularly concerning policy making, see Kempe, 2020.

34 Ibid.

35 UN Meetings Coverage and Press Releases, UN Security Council 8346th meeting, 10 September 2018 (29 September 2021, 2:40 PM)

36 Ibid.

37 Zvekić & Roksandić, 2021.

38 Ibid, Part 3.

39 International Chamber of Commerce, *The ICC Rules on Combating Corruption*, These Rules are intended as a way for businesses to self-regulate against the background of applicable national law and key international legal instruments.

40 Particularly for economic crimes or international economic criminal law, see in detail in Roksandić Vidlička, 2017. Also see Jessberger, Kaleck & Singelstein 2015.

41 Engelhart & Roksandić 2021.

Although corruption is ‘a complex and contested concept’,⁴² criminal offences falling into this category are, in the author’s opinion, easier to define and at the same time follow the principle of legality which is the main principle in (international) criminal law, particularly in the period following World War II and the Cold War.

As underlined in Roksandić Vidlička (2017),⁴³ in dealing with the principle of legality in the landmark case of *C.R. v. The United Kingdom*,⁴⁴ the ECtHR specified that Article 7 ‘cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen’. As Schabas points out⁴⁵ for the application of Article 7(1), the ECtHR often seems to be inspired by the same approach adopted by the International Military Tribunal and endorsed by Kelsen.⁴⁶ One result of this is the rejection of pure legal positivism in favour of “reasonably foreseeable” and “accessible” tests. The principle of *nullum crimen sine lege* does not bar the development of the law through clarification or interpretation – ‘provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen’.⁴⁷ Therefore, it is the “very essence” of the offence that governs.⁴⁸

The UNCAC defines and criminalises various forms of corruption, including bribery (in both the public and private sectors), embezzlement, trading in influence, illicit enrichment, money laundering and the abuse of functions. These different forms of corruption have been accepted and criminalised by most states, given the almost universal acceptance of the UNCAC.⁴⁹ This Convention is the only legally binding universal anti-corruption instrument, a fact that has its own legal value and meaning.⁵⁰ However,⁵¹ of all the offences in the UNCAC, state parties are obliged to establish⁵² the following as criminal offences: active and passive bribery of national public officials (Article 15), active bribery of foreign public officials and officials of public international organisations (Article 16, para. 1), embezzlement, misappropriation or other diversion by a public official (Article 17), laundering of the proceeds of crime (Article 23), obstruction of justice (Article 25) and participation in any capacity such as an accomplice, assistant or instigator in an offence established in accordance with the Convention (Article 27, para. 1).

42 Ibid. See more on corruption in the UNODC, Module 1 of the E4J Anti-Corruption Series.

43 This paragraph is cited from Roksandić Vidlička, 2017, pp. 133–134.

44 European Court of Human Rights, *C.R. v. The United Kingdom*, Series A, No. 335-B, para. 41.

45 Schabas, 2011.

46 Kelsen, 1947. For an endorsement of Kelsen’s approach, see the reasons given by Justice Peter Cory in *R. v. Finta* (1994), Supreme Court Reports 701, at 874 (all cited in Schabas, Ibid., p. 615).

47 Judgment *C.R. 22 November 1995*, A. 335-C, para. 34.

48 This paragraph is cited from Roksandić Vidlička, 2017, p. 134.

49 As of January 2024, there are 190 parties to the UNCAC.

50 Roksandić Vidlička, 2017, at 62.

51 Also emphasised in Engelhart & Roksandić, 2021.

52 “shall”

Concerning the bribery of foreign public officials, the main legal source, although limited in terms of state parties but important in its influence and scope, is the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.⁵³

Therefore, in the author's opinion, the principle of legality also requires that the protective aim of Article 7 of the ICCSt be clearly identified. The *Rechtsgut* in need of protection by prosecuting crimes involving grand corruption⁵⁴ on an international level is the 'security, peace and well-being of the world', as given in the preamble to the ICCSt.

If such an understanding is widely accepted, serious and widespread crimes of corruption could be interpreted as 'other inhuman acts' (Article 7(1)(k) ICCSt) under crimes against humanity if the chapeau element is fulfilled.

Crimes against humanity are committed when one of the acts⁵⁵ listed in Article 7 of the ICCSt is committed as part of a widespread or systematic deliberate attack directed against any civilian population. Beside the explicitly defined acts, crimes against humanity can also be subsumed under 'other inhumane acts of similar character intentionally causing great suffering, or serious injury to body, mental or physical health', as described in Article 7 para. 1(k) of the ICCSt. According to the ICC's Elements of Crime, "Attack directed against a civilian population" is understood to mean a course of conduct involving the multiple commission of acts referred to in Article 7(1) of the ICCSt against any civilian population, pursuant to or in furtherance of a state or organisational policy to commit such attack. The acts need not constitute a military attack. It is understood that "policy to commit such attack" requires that the state or organisation actively promote or encourage such an attack against a civilian population.⁵⁶ A policy which has a civilian population as the object of the attack would be implemented by state or organisational action. Such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack. The existence of such a policy cannot be inferred solely from the absence of governmental or organisational action.⁵⁷ Also, in the Pre-Trial Chamber Decision in the Bemba Gombo case⁵⁸ it has

53 The Convention entered in force in February 1999. All OECD and seven non-OECD countries were signatories.

54 For the definition, see also Transparency International's definition of grand corruption: <https://www.transparency.org/en/our-priorities/grand-corruption>

55 Murder, extermination, deportation or forcible transfer of population; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture; rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity; persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this paragraph or any crime.

56 See also, as an example, the definition of the attack in Article 7(2)(a): the attack need not be violent; see the case law of the ICTR, e. g. in the Prosecutor v. Akayesu 581.

57 See fn.6 of Article 7., Elements of crime.

58 Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the charges of the Prosecutor against Jean-Pierre Bemba Gombo, Pre-Trial Chamber II | 15 June 2009 | ICC-01/05-01/08-424.

been clearly confirmed as well: Concerning the definition of the term “attack”, the Elements of Crimes clarify that it does not necessarily equate with a “military attack”. Rather, the term refers to a campaign or operation carried out against the civilian population, the appropriate terminology used in article 7(2)(a) of the Statute being a “course of conduct”. The commission of the acts referred to in article 7(1) of the Statute constitute the “attack” itself and, beside the commission of the acts, no additional requirement for the existence of an “attack” should be proven (para. 75).

Therefore, I argue that, alongside environmental⁵⁹ crimes, serious crimes of corruption, and particularly corruption offences as described in the UNCAC, find their place in Article 7 para. 1(k) as ‘other inhumane acts’⁶⁰ following Article 21 of the ICCSt and in accordance with the principle of legality (Articles 22 and 23 of the ICCSt). The phrase “intentionally causing great suffering or serious injury to body or to mental or physical health” is an effort to define this paragraph in a way that can still be considered consistent with the principle of *nullum crimen sine lege*.⁶¹ As underlined by Broomhall, ‘the requirement of strict construction of criminal statutes is said to form part of the *nullum crimen principle*. To that extent, its express inclusion here simply reassures States as to the moderation with which the Court will interpret its Statute’.⁶²

4. Art. 21 of the Statute of the International Criminal Court – Legal basis for interpreting Art. 7 of the ICCSt

The process of connecting narratives of international criminal law with discourses on international human rights law (based on Article 21 of the ICCSt) aiming to protect economic and social rights is still ongoing. Article 21 of the ICCSt gives the applicable law for the interpretation of the provisions of the ICCSt and reads as follows:

1. The Court shall apply:

- (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;*
- (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;*
- (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws*

⁵⁹ See here also, as an example, Lambert, 2017.

⁶⁰ See also Starr, 2007; Bantekas, 2006.

⁶¹ Boot, 2008.

⁶² Broomhall, 2008. p. 723.

of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognised norms and standards.

2. The Court may apply principles and rules of law as interpreted in its previous decisions.

3. The application and interpretation of law pursuant to this article must be consistent with internationally recognised human rights, and be without any adverse distinction founded on grounds such as gender as defined in Article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

Clearly, the link between transnational and core crimes – between UNCAC and UNTOC crimes and core international crimes – exists.⁶³

Therefore, Article 21 of the ICCSt should serve as the legal basis for understanding that serious and widespread crimes of corruption should be interpreted as ‘other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health’.

As noted in Engelhart & Roksandić, neither the current application of the UNCAC, the UNTOC, nor the ICCSt seem to provide the final step that is urgently needed: to effectively prosecute the implied serious environmental and economic crimes, including crimes of corruption, that are systematic and widespread and violate all human rights as international crimes. The lack of universal acceptance of the latter by all relevant stakeholders is striking.

Concerning the ICC, one sign of progress was the Office of the Prosecutor’s (hereinafter: OTP) policy from 2016 which specifically mentions financial crimes.⁶⁴ According to the Policy Paper on Case Selection and Prioritization,⁶⁵ the Office of the Prosecutor of the ICC will select cases for investigation and prosecution in light of the gravity of the crimes, the degree of responsibility of the alleged perpetrators and the potential charges. The impact of the crimes may be assessed in light of, inter alia, the suffering endured by the victims and their increased vulnerability, the terror subsequently instilled or the social, economic, and environmental damage inflicted on the affected communities.⁶⁶ In the same policy paper on case selection and prioritisation, it is added that the Office will give particular consideration to prosecuting ICCSt crimes that are committed by means of, or that result in, inter alia, the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land. Unfortunately, if one wishes to follow its one criteria, it is not enough to only prescribe that the OTP will also seek to cooperate and provide

63 See in particular UNODC Module 11.

64 ICC, The Office of the Prosecutor, *Policy Paper on Case Selection and Prioritization* (September 2016.)

65 Ibid.

66 Para. 44 of the Policy Paper. For case prioritisation criteria, see para. 47 of the Policy. See also Proserpi & Terrosi, 2017.

assistance to states, upon request, to conduct what constitutes a serious crime under national law such as the illegal exploitation of natural resources, arms trafficking, human trafficking, terrorism, financial crimes, land grabbing or the destruction of the environment.⁶⁷

Although this sounds very promising on paper and is in line with the arguments used by the author in the course of her own research, its practical implementation is far from satisfying. Despite over a decade of efforts by legal scholars and NGOs, not a single case has yet been taken in which serious corruption has been treated as a crime against humanity.⁶⁸

It is also important to underline the policy approach used in the EU. As emphasized in Engelhart & Roksandić:

At the EU level,⁶⁹ as identified by Ziccardi Capaldo, the European Court of Justice's innovative approach to tax fraud from a human rights perspective (respect for the protection of the basic economic and social rights of the person) in the *Taricco I* judgment could be an opportunity to 'develop a judicial dialogue between international and national courts aimed at strengthening the paradigm of the no-impunity-imprescriptibility of the new criminal jurisdiction centred on the International Criminal Court (ICC)'. The ICC is not formally extending its jurisdiction to financial (economic) crimes, 'but this process has begun'.⁷⁰ This approach implies acceptance that the perpetrators of such crimes should not go unpunished.⁷¹

The question of retroactivity also plays a role when discussing economic crimes. Croatia is an examples of the prosecution of transitional economic crimes and war profiteering. In 2010, Croatia abolished the statute of limitations for transitional economic offences with retroactive effect,⁷² based on the justification that these crimes are regarded 'as extremely grave crimes for which it is necessary, right and justified to rule out the application of the statute of limitations, particularly keeping

67 As cited in Englehart & Roksandić.

68 For example, the Socio-Economic Rights and Accountability Project (SERAP) petitioned the Prosecutor of the ICC on 20 April 2012 to investigate '*whether the widespread and systematic corruption over the \$6 billion in the fuel subsidy scheme (...) amounted to inhumane acts which intentionally caused great suffering (or serious injury to body or to mental or physical health)*'. See more in Roksandić Vidlička, 2017, p. 387. The independent Prosecutor of the ICC may proprio motu trigger proceedings, requiring only the concurrence of judges of the ICC Pre-Trial Division (Articles 13 and 15 of the ICCSt).

69 Also see Deutsche Welle, 2021.

70 Ziccardi as cited.

71 As researched in more detail in Engelhart & Roksandić, 2021.

72 Constitutional Amendments Official Gazette 76/2010, Article 31(4) of the Constitution: The statute of limitations shall not apply to the criminal offences of war profiteering, nor any criminal offences perpetrated in the course of economic transformation and privatization and perpetrated during the period of the Homeland War and peaceful reintegration, wartime and during times of clear and present danger to the independence and territorial integrity of the state, as stipulated by law, or those not subject to the statute of limitations under international law. Any gains obtained by these acts or in connection therewith shall be confiscated.

in mind circumstances of perpetration and consequences caused'.⁷³ According to the explanation given by the legislator for this constitutional amendment, such crimes are considered extremely serious and continue to undermine Croatian society; such crimes – and their offenders – should therefore not be afforded any privilege under the country's statute of limitations. However, on 24 July 2015, almost five years later, the Constitutional Court narrowed the possibility of the retroactive application of such crimes. According to its 2015 decision,⁷⁴ the abolition of retroactivity cannot apply to offences for which the statute of limitations has expired before 16 June 2010. This decision significantly limited the ability of the state to prosecute and punish economic offences committed in the transitional period as the statute of limitations had already expired for the great majority of privatisation and ownership transformation crimes committed during the Homeland War.⁷⁵

The case of Croatia concerning transitional economic crimes is evidence that, similarly to core crimes, national states are not always able to and/or are unwilling to prosecute serious and systemic crimes involving corruption. When such crimes have the potential to undermine the peace, security and well-being of the world they could be considered as international crimes.

To conclude, 'with regard to economic (corruption) crimes – with some exceptions in the ICC Statute when a reference is made to plundering and the environment in the context of war crimes⁷⁶ – these are to be found in international treaties'.⁷⁷

5. Proposal for the future based on the accepted notion of human security

Core crimes that affect all mankind and are a threat to international peace and security and the well-being of the world are listed in the ICCSt.

When one defines security, a broader concept of human security should be invoked. The concept of human security partly emerged from the UNDP Development Report (1994), which lists seven types of security: economic, food, health, environment, personal, community and political security. With the adoption of the SDGs, the United Nations General Assembly has reaffirmed the notion of human security and the concept of human security has shifted its focus from a state-centred to a

73 The decision proposal to amend the Constitution of Croatia 2009, 8.

74 Croatian Constitutional Court, decision No. U-III-4149/2014, 24 July 2015.

75 Engelhart & Roksandić, 2021. See more in Roksandić Vidlička, 2014.

76 See Article 8(2)(b)(iv) ICCSt that mentions 'severe damage to the natural environment'. The ICCSt prohibits pillaging under Article 8(2)(b)(xvi) and (e)(v) of the ICCSt, thereby making pillage a war crime in both international and non-international armed conflict. For pillage see Engelhart & Roksandić 2021 for example, Steward, 2011.; Radics & Bruch, 2017.

77 Engelhart & Roksandić, 2021.

people-centred approach. This puts more of a spotlight on the individual and collective interests of humans. The link between corruption and other crimes where corruption serves as a predicate or subsequent offence, was until recently often neglected in the discussion. To this extent, “grand corruption” is an international concern.⁷⁸

In the author’s opinion, by ignoring serious and widespread crimes of corruption and violations of economic and social rights, international, transnational and national criminal law are no longer responding to the needs of societies and individuals. As already emphasised, it seems at least that world consensus exists that serious and widespread corruption, especially including VQA, does threaten international peace, security and global well-being.

6. Conclusion – Proposals for discussion at the European level

On the international level, the author is of the opinion that one could interpret the ICCSt open-clause provision of Article 7 para. 1(k): ‘other inhumane acts of similar character intentionally causing great suffering, or serious injury to body, mental or physical health’ to include serious violations of economic and social rights by crimes of corruption as defined in the UNCAC. The main aim of this contribution, and the lecture delivered at the conference *The ICC at 25*, was to present this proposal to scholars and experts in Central Europe for reflection and further research.

As also proposed in Engelhart & Roksandić, a possible solution to transnational protection of serious and large-scale corruption with VQA, would be for the EU to endorse and show leadership in proposing a new protocol to the UNCAC and UNTOC that would cover those UNCAC, particularly crimes that are widespread and/or systematic in nature or crimes that include VQA and are transnational in nature. In addition, it might be necessary to think about specifically mentioning such forms of offences involving corruption in the form of a Directive.⁷⁹ On a national level, states could introduce a new offence, or introduce an aggravated form of corruption that would punish more severely those UNCAC crimes that are widespread and/or systematic in nature or when they include VQA and are transnational in nature.⁸⁰ In any case, the 2023 Eurobarometer survey data on the prevalence of corruption in EU indicates that the majority of Europeans (70% of all EU citizens as surveyed)

78 Engelhart & Roksandić, 2021.

79 Currently, the EU Commission is proposing a Directive on Combating Corruption. In relation to the entire EU anti-corruption package, see in Clementucci & Miekina, 2023.

80 Also proposal from Engelhart & Roksandić, 2021.

perceive corruption as a concrete problem and the last survey shows ‘growing scepticism among Europeans’.⁸¹

On a national level, states could also start interpreting national provisions of crimes against humanity to include serious violations of economic social rights or widespread corruption, environmental damage and systematic deprivation of health if there is a corresponding open clause to the provision of Article 7 para. 1(k) of the ICCSt: ‘other inhumane acts of similar character intentionally causing great suffering, or serious injury to body’.

An additional solution, as emphasised in Engelhart & Roksandić, could be drafting a new protocol to the UNCAC and UNTOC that would cover those UNCAC, particularly crimes listed that are widespread and/or systematic in nature or those that include VQA and are transnational in nature. In such a step, the strong link between corruption and organised, that was stressed by the 2020 EU security strategy,⁸² could be taken up.

The distinction between crimes involving corruption on a national, transnational and international level should be made clear. Among those, crimes involving corruption with devastating consequences for human rights could be those that fall, if other elements are fulfilled, under the jurisdiction of the ICC, even if a special international anti-corruption court is established in the future.

81 For the details, see the European Commission, 2023.

82 European Commission, Communication from the Commission on the EU Security Union Strategy of 24.7.2020, COM (2020) 605 final, 20. See more in Roksandić, 2021.

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CHAPTER 13

SHOULD WE BRING PEACEKEEPERS BEFORE THE ICC? - CASE STUDY OF BURUNDI



ANDRÁS HÁRS

Abstract

Burundi has been a consistent participant in United Nations peace operations since the resolution of its domestic crisis in the mid-2000s. However, the conduct of its forces in multinational peace operations has come under significant scrutiny in the last decade, with recurring incidents of severe crimes, such as sexual exploitation and abuse being reported. Since the rule of law norms are precarious, with judicial independence being virtually non-existent, the question of whether peacekeepers from Burundi should be tried for international crimes before the International Criminal Court arises. This chapter examines the overall legal situation, specifically regarding any jurisdictional difficulties that might arise, and offers a reality check from the decision makers' perspective on the level of states and international organisations to highlight the positive and negative ramifications of trying peacekeepers before an international criminal tribunal.

Keywords: International Criminal Court, jurisdiction, Burundi, peace operations, peace v. justice

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1. Introduction

The present chapter aims to understand some of the ramifications of bringing United Nations (UN) peacekeepers before the International Criminal Court (ICC) for serious violations, mainly of sexual nature, amounting to international crimes. Burundi's case is used as an example, and the role and possibilities available to the ICC in case systematic human rights violations are observed by the country's military stationed abroad, are highlighted. The chapter does not tackle issues such as the legality of the operation and the legitimacy of accepting contributions from a regime that frequently violates the fundamental human rights of its citizens domestically. Similarly, *ius in bello* questions concerning the unlawful conduct of peacekeepers are omitted as they could derail the discussion from the international criminal law issues that arise.

The chapter provides an overview of the situation in Burundi, specifically with regard to the standards of the rule of law, democracy, and overall human rights, to assess whether a free and fair trial on a domestic level can be realistically expected, instead of a process before the ICC. Second, the acts committed in the Central African Republic (CAR) are addressed to ascertain whether they can constitute one or more international crimes, focusing on war crimes and crimes against humanity. Third, jurisdictional matters are addressed at the level of the ICC, focusing on the notion of complementarity with an added reality check to determine if cooperation is feasible and/or likely in the near future. Finally, a brief overview of the legal, political, and institutional ramifications of bringing peacekeepers before the ICC is presented, with some recommendations for the future.

2. Burundi at a glance

2.1. Rule of law standards, democracy, and human rights

Burundi, a relatively small state in the central and eastern part of Africa, has had a turbulent history. Even overlooking its colonial period and simply considering the events that transpired in the last two decades reveals a sobering reality – Burundi has experienced civil war, economic hardship, deforestation, high inflation, fuel shortage, and, a general decrease in living standards.¹ Regarding the standards of democracy, human rights, and the rule of law, the country has consistently appeared at the bottom international ranking lists. For example, in terms of democracy, independent research by Julius Maximilians Universität Würzburg ranked it 158th

1 Global Forest Watch analysis.

out of the 176 states observed, labelling it a “hard autocracy”.² Indeed, political plurality and free and fair elections are a dream that is yet to be realised. The 2022 Freedom House report provided a more detailed analysis. According to their metrics, the country scored 14 out of 100 points, indicating an iron-fisted regime of the ruling party, where human rights and civil liberties are curbed. Of particular significance is the status of the judiciary, which the report describes as ‘[...] *hindered by corruption and a lack of resources and training*’, while also being ‘[...] *subservient to the executive, which regularly interferes in the criminal justice system*’ and ‘[...] *used to persecute the political opposition*’.³

Furthermore, civil liberties cannot be expected to be expanded in the current system where 19% of girls are married before the age of 18, and same-sex relationships between consenting adults are considered a criminal offence punishable with two years of imprisonment; needless to say, same-sex marriage is prohibited.⁴ Even if there was a judicial process regarding a human rights violation, the Freedom House report indicates that ‘*Constitutional guarantees of due process are generally not upheld. Arbitrary arrest and lengthy pretrial detention are common*’.

Overall, compliance with international standards for the rule of law and the protection of human rights remains nominal, with the country placing little emphasis on abiding by its international obligations. As the current, fourth cycle of the Universal Periodic Review by the UN Human Rights Council highlights, there have been promising initiatives, such as the establishment of the National Observatory for the Prevention and Eradication of Genocide, War Crimes, and Other Crimes against Humanity in 2017. However, the Observatory was rendered redundant in 2021-2022 due to the lack of funding and resources by the central government, with no plan of action four years after its creation.⁵

2.2. Contribution to UN peace operations

Burundi has a long experience with peace operations. From 2004 to 2006, the UN Operation in Burundi (ONUB) was deployed after the domestic crisis of previous years had receded.⁶ Since its relatively positive experiences with UN peace operations, the country has participated in UN peace operations, particularly in the CAR (the Multidimensional Integrated Stabilisation Mission in the Central African Republic [MINUSCA]),⁷ where it has sent 774 troops so far.⁸ Several factors have influenced the continuous support of UN peace operations in the CAR, including the positive

2 Julius Maximilians Universität Würzburg – democracy matrix.

3 Freedom House report of 2022 concerning Burundi.

4 Human Rights Watch: 2024 Report on Burundi.

5 Compilation of information prepared by the Office of the United Nations High Commissioner for Human Rights, Human Rights Council, 7 February 2023, A/HRC/WG.6/43/BDI/2, Art. 8.

6 United Nations Security Council Resolution 1545, 21 May 2004.

7 United Nations Security Council Resolution 2149, 10 April 2014.

8 UN Peacekeeping – MINUSCA mission overview.

experiences of the country; the perceived contribution of the peace operation to the wider central and eastern African region, where Burundi is also situated, resulting in the possibility of controlling migration and refugee waves; and being a prime ground for the military to gain first-hand experience in international cooperation. Sceptics have pointed out that this continuous support has not been influenced by altruistic and security reasons only but also a financial one, as Burundi has profited 13 million dollars from the UN out of a 1.1 billion dollar budget for the operation, making it a lucrative venture for the country; this is excluding the personal gains obtained by looting and pillaging the local population.⁹ The question in this instance is what is worth more for the UN: turning a blind eye to the abuses and the loss of the organisation's reputation resulting from the continuous violations by peacekeepers from Burundi, or the several-hundred-strong contributions of the country to the peace operation. By reaching the threshold of international crimes, the scales could be tipped, and the UN could be forced to act. Voices have already been calling for the removal of Burundi from peace operations since 2019.¹⁰

3. Acts committed in the Central African Republic and their evaluation under international criminal law

Several reports have shown severe criminal acts committed by peacekeepers from Burundi in the CAR. In their 2019 open letter, Code Blue cited at least 43 reported allegations that have occurred since 2015.¹¹ The Guardian reported a similar number, naming 41 peacekeepers based on a UN report in 2015–2016.¹² It would be both superficial and incorrect to put all the blame on Burundi, as other states, such as Gabon and Tanzania, have also been accused of turning a blind eye to systematic misconduct.¹³ This is also not an isolated incident, as lately in the spring of 2023, Tanzania was asked to repatriate 60 of its peacekeepers, as news of sexual exploitation and abuse was widely reported, and the UN was forced to act.¹⁴

9 Burke, 2017, p. 49; Code Blue Campaign, 2019.

10 Code Blue Campaign press release, 2020.

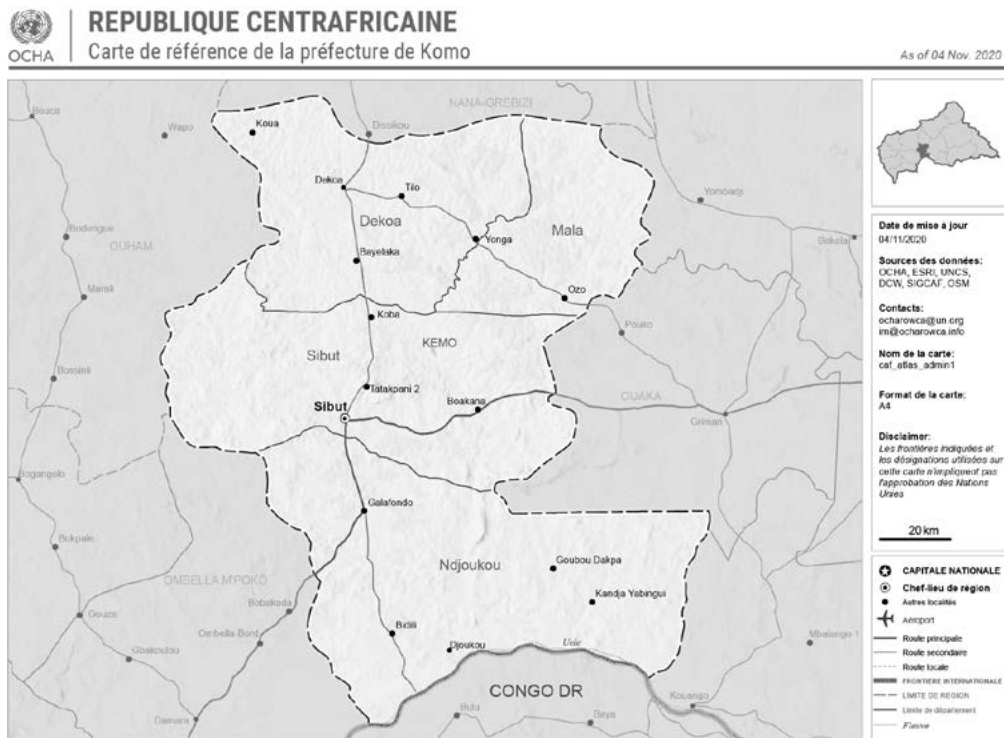
11 Code Blue campaign, 2019.

12 Boffey, 2016.

13 Burke, 2017. p. 12.

14 The New Humanitarian Report, 2023.

Map 1. Komo prefecture in the CAR, where most of the alleged conduct took place.



Source: UN Office of the Coordinator for Humanitarian Affairs¹⁵

These numbers should be understood in context. Crimes that are sexual in nature remain among the most underreported due to their sensitive nature; they are accompanied by a sense of shame on the victim's part, their reluctance to relive the trauma, disbelief among authorities, and family or societal stigmatisation. Coupled with a broken state apparatus – which necessitated the establishment of the peace operation in the first place – and the fact that an “allegation” can encompass several victims and/or perpetrators as a single case, it can safely be assumed that the reported number is merely the tip of the iceberg.¹⁶

The type of crime that was reported to have been committed in the aforementioned section in the “allegations” against peacekeepers from Burundi was labelled as sexual exploitation and abuse, which encompass a myriad forms of crimes of a sexual nature based on the terminology used by the UN.¹⁷ Conducts include rape and other forms

¹⁵ United Nations Office for the Coordination of Humanitarian Affairs, 2020.

¹⁶ Hårs, 2021. p. 104.

¹⁷ Venturini, 2019. pp. 26–27.

of sexual violence, rape against a minor, and soliciting sexual favours in exchange of goods or services.¹⁸ The role of the Burundi government is unclear and would warrant further investigation by the Prosecutor of the ICC should he decide to investigate the matter thoroughly. Options range from “merely” not dissuading its peacekeepers to overtly encouraging and supporting all manner of unlawful action against the local populace. Clearly, Burundi has refused to prosecute any of its peacekeepers for the alleged crimes since the initial reporting of those crimes in 2015-2016.

3.1. War crimes

The “simplest” international crime that can be applied is war crimes. Under the Rome Statute of the ICC, a conduct can be understood as “war crimes” ‘*when committed as part of a plan or policy or as part of a large-scale commission of such crimes*’.¹⁹ We are not talking about singular acts or a few separate cases. The fact that 41-43 peacekeepers were repatriated as possible perpetrators indicates that the crimes in question were committed by approximately 7% of the Burundian personnel, revealing systematic problems sufficient enough to label the conduct as “large-scale”; however, currently, the “part or plan” cannot be proven to a sufficient degree. Nonetheless, based on the wording of the Statute, fulfilling even one of these criteria would be sufficient for the large-scale commission to be evident.²⁰

Besides the nature of these crimes, individual conduct must also be considered. Article 8 (1) Para (e) of the Rome Statute states, ‘*Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions*’. The reports originating from the region mention rape and other forms of conflict-related sexual violence, which clearly match the conduct described in the Rome Statute. The tenet for the prohibition of rape and other forms of sexual crimes is also supported by the International Committee of the Red Cross (ICRC) customary law database, which establishes the rule for international and non-international armed conflicts deriving from the general prohibition enshrined in the common Article 3 of the Geneva Conventions.²¹ Amnesty International cited an August 2015 event where a young girl aged 12 was raped by MINUSCA personnel.²² This flagrant violation of the obligations of peacekeepers resulted in the resignation of special representative Babacar Gaye from MINUSCA.²³ From a procedural perspective and as a side-

18 United Nation News 2016.

19 Rome Statute Art. 8(1).

20 Harrington, 2005. p. 141.

21 ICRC Customary Law Database: Rule Number 93, Rape and Other Forms of Sexual Violence.

22 Amnesty International, 2016.

23 It is disputed whether it was a voluntary resignation or a forced one by then Secretary-General Ban Ki-moon. United Nations’ Central African Republic envoy Babacar Gaye sacked over peacekeeper abuse claims, 2015.

note, the Office of Internal Oversight Services (OIOS) launched an investigation regarding the incident.²⁴ In cases where the investigation led to sufficient evidence regarding the criminal conduct of peacekeepers, the contributing state is alerted. This results in the alleged perpetrators being repatriation and possibly facing a domestic criminal process, the latter of which we have no confirmation about for almost ten years.

3.2. Crimes against humanity

Another possibility would be the assumption that crimes against humanity have taken place.²⁵ According to Article 7 Section (1) of the Rome Statute, this can occur ‘*when [it is] committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack*’. Coupled with Section (1) Para (g), which states that the act in question can take the form of ‘*Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity*’, whether crimes against humanity could be applicable in this scenario should be examined.²⁶ The Prosecutor of the ICC will need to consider whether the “attack” nature can be proven; however, due to the scarce availability of information, it is hard to imagine (and even harder to prove) that the government of Burundi or the military leaders of MINUSCA would deliberately attack the local population of the CAR.²⁷

There have been several cases during the course of which the ICC developed the case law regarding classifying conflict-related sexual violence as crimes against humanity. In the 2019 Ntaganda case, the ICC made substantial strides regarding instances where sexual violence was committed by a group of perpetrators against a group of victims,²⁸ whereas in the 2021 Ongwen case, the ICC analysed *inter alia* the issue of forced marriage and child soldiers.²⁹ While the Ntaganda and Ongwen cases were not related to the conduct of peacekeepers, they underscore the point that the ICC has become much more alert and reflective in its understanding of sexual and gender-based violence along with conflict-related sexual violence. It also highlights a shift in the policy considerations of the Prosecutor, which is a hopeful turn of events in terms of potential the prosecution of Burundi nationals for similar conduct.

24 Amnesty International, 2016.

25 O’Brien, 2006. pp. 284–285.

26 Rome Statute, Art. 7 Sec. (1).

27 Harrington, 2005. p. 141.

28 The Prosecutor vs. Bosco Ntaganda, ICC-01/04-02/06, Trial Judgment, 8 July 2019; Tridgell, 2017. p. 158; Modzeleski, 2019. p. 723.

29 The Prosecutor v. Dominic Ongwen, ICC-02/04-01/15. Trial Judgment, 4 February 2021, Para 205–209. Sec. a.; Souris, 2019. p. 483; Kwik, 2020. p. 136.

3.3. *The issue of command responsibility*

Another closely related aspect is the matter of command responsibility for the conduct. Since it is the Prosecutor's long-standing policy to bring cases where the alleged perpetrator is a leader, architect, or decision-maker for the crime in question, the criminal responsibility of the contingent commander should also be considered. In the Bemba case before the ICC, the Appeals Chamber in 2018 made some fundamentally important statements. It established standards for not only developing individual reports, even for those high in the chain of command, about the crimes taking place, but also the widespread manner in which news is disseminated amongst the general public about the crimes committed, leading to the perpetrator "knowing" about the criminal acts.³⁰ These conditions are also sufficient if the commander is not present on the ground but is at a remote location.³¹ However, when the Appeals Chamber acquitted Mr. Bemba, they stated that the decisions and sanctions made by Bemba were in line with his possibilities at the time, given the circumstances of the case.³²

Transferring the morals learned from the Bemba case to the conduct of Burundi peacekeepers in CAR reveals considerable similarities. Based on the available information, the commanders of the operation had to know that soldiers under their command committed criminal acts. Whether the action taken before deployment was sufficient or not is another matter. For example, were soldiers warned of criminal responsibility ramifications for their conduct? Was it established that swift, disciplinary action would be taken should the personnel breach existing obligations? These questions require an independent investigation. Even more pressing are questions regarding what actions were taken upon the resignation of special representative Babacar Gaye, when it became apparent that several, serious violations had taken place – when it could be concluded that the sexual crimes were not simply a one-off, unrelated events but symptoms of a systematic fault in how the operation was run. To date, nothing is known about the possible actions taken by the contingent commander of Burundi or persons close to them in the military hierarchy. However, this could serve as the focal point for the Prosecutor's investigation.

30 Prosecutor v. Bemba, no. ICC-01/05-01/08 A, Appeal Judgement, 8 June 2018, Paras 170, 179.

31 Jackson, 2018.

32 Chadimová, 2019. pp. 308–309.

4. Burundi and the International Criminal Court – matters of jurisdiction and cooperation

To ascertain the jurisdiction of the ICC, the general legal situation must be evaluated in a nutshell. The peace operation in the CAR envisioned cooperation with the ICC. Specifically, it enabled, envisioned, and rendered desirable for the ICC to hold accountable perpetrators of acts amounting to crimes under the Rome Statute of the Court under the mandate of MINUSCA.³³ The CAR has been a state party to the Rome Statute since 2003. The CAR has referred the entire “situation” occurring on its territory between 2002 and 2003 to the ICC³⁴ and the renewal of violence on its territory in 2012.³⁵ However, that took place before MINUSCA’s establishment in 2014. Therefore, the present referral by the CAR would not provide sufficient jurisdictional ground for the Prosecutor to begin the investigation. Despite this fact, being a state party on whose territory international crimes have occurred, the Prosecutor possesses the capacity to launch the process *ex officio*. Presently, let us not forget that in a peacekeeping environment, the UN, the troop-contributing countries, and the host state are bound by the so-called memoranda of understanding (MoUs) as well as status of forces agreements (SoFAs). These agreements specifically mandate the exclusive criminal jurisdiction of the host state, thereby not enabling criminal processes in either the host state or before international fora.³⁶ This legal stringency explains why the UN’s response in most cases end with the repatriation and blacklisting of alleged perpetrators (the latter for substantiated allegations only), and the occasional sacking of the force commander who demonstrated a soft attitude towards criminal acts committed under his watch.

A possible way to get around the jurisdictional hurdle would be a referral by the UN Security Council, which could serve as a clear-cut solution for this Gordian Knot. It worked previously, in cases concerning Darfur and Libya; however, in the current international environment, it is unlikely to happen.³⁷

Burundi has been a state party since 2004 when it ratified the Rome Statute.³⁸ Of the three possibilities, the process before the ICC can be launched (referral by

33 UN SC Res 2149/2014 (10 April 2014) Art. 12:

Reiterates that all perpetrators of violations of international humanitarian law and human rights violations and abuses must be held accountable and that some of those acts may amount to crimes under the Rome Statute of the International Criminal Court (ICC), to which the CAR is a state party, recalls the statements made by the Prosecutor of the ICC on 7 August 2013 and 9 December 2013, notes further the opening of a preliminary examination by the Prosecutor of the ICC on alleged crimes committed in the CAR since September 2012, and welcomes the cooperation by the Transitional authorities in this regard.

34 CAR’s 1st referral of the situation in 2002-2003 to the ICC.

35 CAR’s 2nd referral of the situation in 2012 to the ICC.

36 Notar, 2006. p. 428.

37 Béres, 2021. pp. 51–59. For some political side-effects on why referral would not be the ideal solution, please refer to Chapter 5 of this paper.

38 International Criminal Court, 2004.

state, referral by the UN Security Council, and investigation by the Prosecutor). The *proprio motu* investigation by the Prosecutor was initiated on 25 October 2017.³⁹ Shortly thereafter, Burundi's withdrawal came into effect on 27 October 2017. It is evident from the timeline that the Prosecutor's announcement to launch the investigation was delayed as long as possible in the hope that Burundi's government might change its mind and renounce the withdrawal. When it became apparent that the country would proceed with it, the Prosecutor was forced to announce the commencement of the investigation in the last minute so as not to lose temporal jurisdiction after the one-year period from Burundi's initial announcement had expired. The scope of the investigation involves 'crimes against humanity allegedly committed both in and outside of Burundi by Burundian nationals between 2015 and 2017'.⁴⁰ Even though the original purpose and scope of the investigation was to analyse the conduct of various actors during the domestic strife in Burundi, it has nonetheless opened a path for a plethora of different crimes to be investigated during this timeframe.

In terms of the possible jurisdiction of the ICC, besides the material one, temporal, territorial, or personal jurisdiction should be considered along with the tenet of complementarity. Starting with temporal jurisdiction, the acts occurred between 2015 and 2017 when Burundi was a state party to the Rome Statute. The withdrawal from the ICC's Statute only came into effect in 27 October 2017, clearly enabling the Court's jurisdiction from a temporal basis. Regarding the territorial or personal dimensions (without which either is sufficient), it can be established that the CAR was and is still a state party; thus, since the acts in question have occurred on its territory, the ICC shall have jurisdiction. From an active personal perspective, the alleged crimes have been committed by the citizens of Burundi; therefore, as a state party, the ICC has both territorial and personal jurisdiction.

Complementarity is somewhat harder to ascertain.⁴¹ Undoubtedly, Burundi has the primary capacity to initiate a criminal justice process. However, there are no reports indicating that domestic judicial processes have taken place over the course of the almost 7-9 years since the acts have occurred.⁴² There is no clear deadline by which the Prosecutor will have to wait for a country; however, we can make a conclusion based on existing practice.⁴³ Based on the state of the country as established at the beginning of this chapter, it cannot be expected that a government-controlled judiciary would facilitate or even enable such a process, particularly if the government itself has explicitly or implicitly condoned such acts. Even though the latter statement regarding the government's role cannot be substantiated at this

39 ICC 01/17 Situation in the Republic of Burundi.

40 Ibid.

41 Giles, 2017. pp. 182–183.

42 For crimes of a sexual nature committed by soldiers from the Democratic Republic of the Congo in the CAR, there have been attempts at domestic criminal processes, albeit with very limited success. See also Redress and Child Rights International Network (CRIN), 2019–2020, p. 40.

43 Du Plessis – Pete, 2010. pp. 12–13.

point, the lack of domestic process coupled with a weak rule of law and non-existent judicial impartiality are factors that could lead to the shielding of alleged perpetrators, which would not rule out a future process by the ICC.⁴⁴

5. Prospects of “peacekeeper trials” before the ICC – some theoretical and practical considerations

Should the ICC’s jurisdiction be established, besides the purely legal reasoning, some societal and political considerations will need to be considered. First, among the positive ramifications of a trial or series of trials before the ICC, the victim’s standpoint deserves precedence.⁴⁵ In a country ravaged by civil war and constant unrest for decades, showing victims that their suffering is not unheard and that there is justice on the highest level would be a laudable goal.⁴⁶ Furthermore, it would enable aid to the victims through the Trust Fund of the ICC as well as making it possible for reparations to be paid from the assets of the perpetrators.⁴⁷ Concerning future commission of such crimes, the value of deterrence should also be mentioned. Based on cases in the Democratic Republic of the Congo, even an acquittal will have local effects on the credibility and future political aspirations of the indicted.⁴⁸ The process before the ICC would also mean that potentially unreliable, government-controlled domestic courts are taken out of the equation and a veritable, independent, and impartial judicial process could take place. A common denominator in these high-profile cases is that they also serve as fact-finding and in the judgment, the black and white historical narrative can manifest itself for the benefit of not only historians but also future generations attempting to make sense of past events.⁴⁹ On the UN level, facilitating criminal processes before the ICC would reinforce the image of an organisation as a law-abiding entity taking steps to end impunity – an otherwise common criticism regarding crimes of sexual nature by its peacekeepers.⁵⁰

Besides the numerous arguments in favour of international criminal justice, some negative side-effects must also be examined to gain a clear and balanced overview of the situation. The most severe issue is the almost certain lack of participation by Burundi. Since the country has withdrawn from the Rome Statute and has so far

44 Rome Statute Art. 20. Sec. 3 para. a).

45 Defeis, 2017. pp. 210-211.

46 Ferstman, 2013. p. 3.

47 Sexual Exploitation and Abuse in UN Peacekeeping Operations – Improving Victim’s Access to Reparation, Support and Assistance, Redress, 2017, p. 16.

48 Whether the tarnished reputation of the acquitted is beneficial is highly debatable. See: Bloomberg 2018.

49 Venigandla, 2021. p. 7.

50 Wills, 2013. pp. 71-73.

shown no sign of cooperation with the Court, it is unlikely that without meaningful domestic changes, Burundi's stance would be altered. As such, apprehending the alleged perpetrators and bringing them to The Hague is highly doubtful. Since the Rome Statute does not allow for *in absentia* trials, chances are slim that the process can commence in earnest.⁵¹ Even if some of the alleged perpetrators are transferred to the ICC, due to the Prosecutor's policy on dealing with the leaders, orchestrators, and architects of international crimes, only a few key figures are likely to be brought to justice, and even that process is likely to be lengthy, lasting several years. This line of thought causes some scholars to completely abandon the idea of the ICC as a forum for prosecuting peacekeepers.⁵² From a political perspective, "another African case" would reinforce the perceived anti-Africa sentiment the ICC is regularly accused of, forcing it to argue defensively when faced with such accusations.⁵³ From the victim's point of view, having a remote and lengthy trial on the other side of the world may not be sufficient to have a sense of "justice being done", particularly when the prison sentence's comfortable and humane conditions are compared to the brutal and merciless circumstances in which the crimes were committed.⁵⁴ On a slightly more political and international relations side of the arguments, having peacekeepers on the bench of the accused could project a negative view of the UN, which could be seen as an organisation that has previously protected the perpetrators and turned a blind eye to their conduct. Even more relevant could be troop-contributing states' reluctance in either acceding to the Rome Statute for fear of their own citizens being tried by the Court or it could lead to the suspension of their contribution to peace operations, paralysing future operations.⁵⁵

51 As a general rule of thumb, the Rome Statute does not allow *in absentia* trials, demanding the presence of the accused during trial (Rome Statute Art. 61 Sec. 1). The presence of the accused can only be envisioned under very specific circumstances (such as the disruption of the process – Art. 61 Sec. 2) or during specific stages (such as when the Appeals Chamber renders its judgement – Art. 81 Sec. 5). Whether this is a valid stance in the current situation is widely discussed in the academia; however, to date, no concrete shift has been seen among state parties to amend the Rome Statute in this regard. Wheeler, 2020.

52 Harrington, 2005. p. 143.

53 Cannon – Pkalya – Maragia, 2016. pp. 6–28.; Vilmer, 2016. pp. 1319–1342.

54 Regarding the humane conditions in Dutch prisons, for example, in Scheveningen, see: Verfuss, 2018.

55 Genovese, 2018. p. 636.

Table 1. Advantages and disadvantages of the ICC's process of Burundi peacekeepers

Advantages	Disadvantages
sense of justice being done	remote justice – “comfortable” punishment
access to the Trust Fund; enables reparations	lack of cooperation from Burundi – access to potential perpetrators almost impossible
deterrence	anti-Africa perception by the ICC could heighten
no reliance on possibly biased state-controlled domestic courts	small number of perpetrators who can be brought before the ICC; lengthy process
fact-finding, history-establishing nature	could deter countries contemplating the ratification of the Rome Statute
image of the UN taking steps against impunity	contributions to UN peace operations could decrease

Source: the author's own compilation.

6. Concluding remarks

There are compelling reasons both for and against peacekeepers from Burundi before the ICC. The “lesson learned” here is that it may not always be a good idea to charge peacekeepers for international crimes. This is what the UN believes, fearing that its contributors’ support will dwindle, resulting in the UN not advocating this path. Another lesson that “might have been learned” is that deterrence and the realistic possibility of a judicial process can be a good idea, particularly for leaders, as seen in the Bemba Gombo case. The indication by the Prosecutor that the “ICC’s eyes” are upon the country can be sufficient for a domestic criminal process to begin. Although in the case of Burundi, there are no indications towards this direction. Finally, the “unlearned” lesson is that, according to the saying often attributed to Nelson Mandela: “only justice can bring peace”. This is certainly the moral and underlying reason international courts such as the Nuremberg and Tokyo Tribunals, the ICTY, and the ICTR were set up after major conflicts. If we allow free rein to political considerations, the victims’ standpoint and the entire *raison d’être* of international justice mechanisms become moot. To underscore this point, the victims’ standpoint should serve as a testament to the lasting mental and physical damage such acts incur.

„A Burundian soldier dragged this 14-year-old girl into his barracks and raped her in Bangui, Central African Republic (CAR), leaving her pregnant with the baby boy of whom she speaks: “Sometimes when I’m alone with my baby, I think about killing him. He reminds me of the man who raped me”.⁵⁶

56 Sieff 2016.

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VICTIMS' PARTICIPATION IN THE PROCEEDINGS,
REPARATIONS TO VICTIMS, AND LESSONS
LEARNT, UNLEARNT, AND MIGHT HAVE BEEN
LEARNT



SARAH PELLET

Abstract

For a long time, victims of the ‘unimaginable atrocities that deeply shock the conscience of humanity’ were considered at best as mere witnesses, testifying for the Prosecutor – and more rarely for the Defence. It was only with the adoption of the Rome Statute in 1998 that victims were placed at the heart of international criminal justice, recognising for the first time the possibility of their participating in proceedings before an international criminal jurisdiction and claiming reparation for the harm they suffered. But what is the reality from the victims’ perspective?

Keywords: Victims, participation, reparations, International Criminal Court, Trust Fund for Victims

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When I was assigned the topic of the present article, initially to deliver a speech at the conference organised by the Central European Academy and the Ferenc Mádl Institute of Comparative Law, I was left with the daunting realisation that said topic would demand in and of itself a two-day conference, and not merely a 20-minute intervention. I am therefore grateful for the opportunity to dwell at greater length on the merits of the matter here.

The views expressed here are of course my own and not in any way those of the International Criminal Court (the “ICC” or the “Court”). They have been forged by my 20 years spent working for this institution, 19 of them at the independent Office of Public Counsel for Victims which, as you will understand from reading the present article, gave rise to strong feelings of hope but also a lot of frustrations from the victims’ point of view.

In his address before the UN General Assembly to present the 2022 ICC’s annual report, the President of the Court highlighted the fact that ‘[t]he ICC has ushered in a concept of international criminal justice that gives victims a strong role in the process’.¹ He specified that ‘[the Court] invests a great deal of time, energy and resources into making the victim- centred vision of justice a reality’.² In the same vein, a year later, in his address to the UN General Assembly to present the 2023 annual report, the President asserted that ‘[...] reparations to victims feature prominently in the Court’s work’.³

But what is the reality from the victims’ perspective?⁴

1. Hopes by way of lessons learnt

For a long time, victims of the ‘unimaginable atrocities that deeply shock the conscience of humanity’⁵ were considered at best as mere witnesses, testifying for the Prosecutor – and more rarely for the Defence.

In the aftermath of the Second World War, the International Military Tribunals of Nuremberg and Tokyo never considered the lot of victims, except through the lens of prosecuting the crimes that caused the harms they experienced. And despite the fact that the human rights conventions and the evolution of human rights in general

1 ICC, 2022, p. 3.

2 Ibid. p. 7.

3 ICC, 2023, p. 6.

4 This article is not intended to be a rebuttal of the ICC President’s addresses before the UN General Assembly in 2022 and 2023. Rather, these public addresses are referred to in the present article as two examples, among many others, of commonly held views about the central role afforded to victims by the Rome Statute. It is these commonly held views that the article will explore in depth *infra*.

5 See Rome Statute, Preamble, para. 2.

progressively nudged international law towards the idea that victims are entitled to compensation for the harms they suffered, when the International Criminal Tribunals for the former Yugoslavia and Rwanda were created, victims were all but ignored. They did not have *locus standi* in court nor were they able to claim reparation for the harms they had suffered – this possibility was only available in the national sphere.

It is only with the adoption of the Rome Statute in 1998 that victims were placed at the heart of international criminal justice, recognising for the first time the possibility that they could participate in proceedings before an international criminal jurisdiction and claim reparation for the injustices inflicted upon them.

And indeed, one of the main innovations of the Statute of the International Criminal Court has been to shift the role of victims from witnesses – constituting the majority of the incriminatory or exculpatory evidence presented in the proceedings – to one of autonomous participants. Accordingly, before the ICC, victims no longer merely support the thesis developed by one of the parties, namely the Prosecution or the Defence, as traditionally understood until the ratification of the Rome Statute, but also have the ability to present 'their views and concerns' in an independent manner, benefiting from rights and obligations deriving from their status of participants in the proceedings.

From the beginning, one knew that the full recognition of these rights would not be an easy task. Suffice to remember that despite the term "victim" being used no less than 39 times in the Rome Statute adopted in 1998, the negotiators only agreed on the term's definition in the Rules of Procedure and Evidence four years later.⁶ It is all the more surprising that said definition is based on articles 1 and 2 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted by the General Assembly of the United Nations in 1985.⁷

6 See Rule 85 of the Rules of Procedure and Evidence: '*Definition of victims for the purposes of the Statute and the Rules of Procedure and Evidence:*

(a) '*Victims*' means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;

(b) Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes'.

7 See Articles 1 and 2 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted by the General Assembly of the United Nations, 1985: '1. '*Victims*' means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.

2. A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term '*victim*' also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization'.

In the same vein, except for providing that the victims may express their ‘views and concerns’,⁸ and granting specific rights to victims at specific stages of the proceedings, the legal founding instruments of the Court do not offer details about the modalities of their participation in the proceedings. Pursuant to rule 89 (1) of the Rules of Procedure and Evidence, the relevant Chamber shall ‘specify the proceedings and manner in which participation is considered appropriate’. Accordingly, the effectiveness of victims’ participation in the proceedings depends on the interpretation of these statutory provisions by the judges of the Court, and even more so by the victims’ lawyers, who are responsible for representing their interests.⁹

One might have feared that said modalities would vary a lot depending on the composition and specificities of each relevant Chamber, but for a very long time this was not the case. The first victims to be authorised to participate in trial proceedings before the Court were allowed to do so even though the presiding judge was British¹⁰ and therefore traditionally not acquainted with the concept of victims’ participation. From thereon, Chambers have repeatedly stated that the modalities of participation shall ensure a meaningful – as opposed to a symbolic – participation by victims.¹¹

This notwithstanding, I do not intend to suggest that everything has been easy viewed from the victims’ bench. In fact, the very essence of victims’ participation has been the subject of heated controversy and debate since its introduction in the Court’s founding legal texts.

The first challenge was to establish that the principle of victims’ participation as such was no longer questionable and to shift the attention of detractors (including, in particular, virtually all Defence teams involved in cases before the Court) to the implementation of this principle.

8 See Article 68(3) of the Rome Statute: ‘Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence’.

9 See e.g. ‘Major results of the negotiations and the evolution of international criminal law’, in Benedetti, Bonneau, and Washburn, 2014, pp. 152-154.

10 See *The Prosecutor v. Thomas Lubanga Dyilo*, No. ICC-01/04-01/06-1119, Trial Chamber I, Decision on victims’ participation, 18 January 2008. Although, to be fair, the first decision in relation to victims participating in proceedings before the Court was issued by Pre-Trial Chamber I (presided over by a French judge), in the same case, on 17 January 2006. See *Situation in the Democratic Republic of the Congo*, No. ICC-01/04-101-tEN-Corr, Pre-Trial Chamber I, Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, 17 January 2006.

11 See e.g. *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, No. ICC-01/04-01/07-474, Pre-Trial Chamber I, Single Judge, Decision on the set of procedural rights attached to procedural status of victim at the pre-trial stage of the case, 13 May 2008, para. 157.

The large number of victims seeking to participate, the delay induced in the proceedings by the review of the requests for participation and the subsequent participation of victims are amongst the concerns most often expressed.¹²

These concerns triggered various measures developed by the Court for the management of application forms completed by victims, pertaining to the mandate of the Victims Participation and Reparation Section (the “VPRS”). Indeed, although the participation of victims shall not be seen as a right to initiate proceedings or a “*constitution de partie civile*” in civil law, victims may participate in all stages of the proceedings provided they applied in writing, preferably before the beginning of the phase of the proceedings they wish to participate in.¹³ The relevant Chamber issues a *prima facie* ruling, based on the information contained in the application for participation submitted by the victims through the VPRS. Provided that the relevant Chamber is satisfied that their personal interests are affected in conformity with article 68(3) of the Rome Statute, victims may: respond to submissions from other participants in the proceedings once they have been authorised to participate; express their views and concerns to the Chamber, orally or in writing;¹⁴ have access to the documents contained in the record of the case; be notified of public documents filed, as well as

- 12 See e.g. The Prosecutor v. Thomas Lubanga Dyilo, No. ICC-01/04-01/06-901-Corr-tEN, Defence, Corrigendum to the response to the application by victims a/0001/06, a/0002/06, a/0003/06 and a/0105/06 for authorisation to participate in the appeal proceedings relating to the ‘Decision on the confirmation of charges’, 16 May 2006, para. 33: ‘[p]articipation by the victims will also result in delaying the proceedings insofar as the Defence will also be required to respond to the observations of the victims, which calls into question Mr Lubanga’s right to an expeditious trial’.
- 13 Regulation 86(1) of the Regulations of the Court: ‘For the purposes of rule 89 and subject to rule 102 a victim shall make a written application to the Registrar who shall develop standard forms for that purpose which shall be approved in accordance with regulation 23, sub-regulation 2. These standard forms shall, to the extent possible, be made available to victims, groups of victims, or intergovernmental and non-governmental organizations, which may assist in their dissemination, as widely as possible. These standard forms shall, to the extent possible, be used by victims’. However, the decision of the Appeals Chamber of 19 December 2008 calls into question the pervasive participation of victims at the situation stage, limiting this right to “judicial procedures” only, that is “a judicial cause pending before a Chamber”. See ‘Situation in the Democratic Republic of the Congo’, No. ICC-01/04-556, Appeals Chamber, Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007, 19 December 2008 and Situation in Uganda, No. ICC-02/05-177, Appeals Chamber, Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 3 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 6 December 2007, 2 February 2009. See also Situation in the Republic of Kenya, No. ICC-01/09-24, Pre-Trial Chamber II, Decision on victims’ participation in the proceedings in the Republic of Kenya, 3 November 2010, para. 9.
- 14 See e.g. The Prosecutor v. Jean-Pierre Bemba Gombo, No. ICC-01/05-01/08-2027, Trial Chamber II, Second order regarding the applications of the legal representatives of victims to present evidence and the views and concerns of victims, 21 December 2011, para. 19.

of confidential documents;¹⁵ present evidence;¹⁶ challenge the admissibility and relevance of evidence submitted by the other participants;¹⁷ question witnesses, including experts;¹⁸ and testify as witnesses or appear in person before a Chamber.¹⁹

Measures were put in place by the Chambers in order to assist the Prosecution and the Defence with regard to the observations that they can file on said applications pursuant to rule 89(1) of the Rules of Procedure and Evidence. This includes measures such as the extension of deadlines by the relevant Chambers and the allocation of additional resources.²⁰ Lately, the generalisation of the so called “A-B-C approach” has further streamlined the process.²¹

At the same time, some of the judges’ rulings that were at least partly responsible for one of the all-too-frequent criticisms against victims’ participation – the fact that it is time-consuming – have been simplified.

This was the case, for instance, with respect to the practice established by the Appeals Chamber, and applied consistently until 2015, whereby victims wishing to participate in an interlocutory appeal would not have an automatic right to that

- 15 See e.g. *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, No. ICC-01/09-01/11-460, Trial Chamber V, Decision on victims’ representation and participation, 3 October 2012, paras. 64–69.
- 16 See e.g. *The Prosecutor v. Germain Katanga*, No. ICC-01/04-01/07-2288, Appeals Chamber, Judgment on the appeal of Mr Katanga against the decision of Trial Chamber II of 22 January 2010 entitled ‘Decision on the modalities of victim participation at trial’, 16 July 2010, para. 37.
- 17 See e.g. *The Prosecutor v. Thomas Lubanga Dyilo*, No. ICC-01/04-01/06-1119, Trial Chamber I, Decision on victims’ participation, 18 January 2008, para. 109; and No. ICC-01/04-01/06-1432, Appeals Chamber, Judgment on the appeals of the prosecutor and the defence against Trial Chamber I’s decision on victims’ participation of 18 January 2008, 11 July 2008, para. 101.
- 18 See e.g. *The Prosecutor v. Bosco Ntaganda*, No. ICC-01/04-02/06-619, Trial Chamber VI, Decision on the conduct of proceedings, 2 June 2015, para. 64.
- 19 See e.g. *The Prosecutor v. Germain Katanga*, No. ICC-01/04-01/07-2517-tENG, Trial Chamber II, Decision authorising the appearance of victims a/0381/09, a/0018/09, a/0191/08, and pan/0363/09 acting on behalf of a/0363/09, 9 November 2018, para. 18.
- 20 See e.g. *The Prosecutor v. Laurent Gbagbo*, No. ICC-02/11-01/11-86, Pre-Trial Chamber I, Second decision on issues related to the victims’ application process, 5 April 2012; *The Prosecutor v. Bosco Ntaganda*, No. ICC-01/04-02/06-67, Pre-Trial Chamber II, Decision establishing principles on the victims’ application process, 28 May 2013; *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, No. ICC-01/09-01/11-17, Pre-Trial Chamber II, first decision on victims’ participation in the case, 30 March 2011; *The Prosecutor v. Dominic Ongwen*, No. ICC-02/04-01/15-299, Pre-Trial Chamber II, Decision concerning the procedure for admission of victims to participate in the proceedings in the present case, 3 September 2015; and *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, No. ICC-01/09-01/11-249, Pre-Trial Chamber II, single judge, decision on victims’ participation at the confirmation of charges hearing and in the related proceedings, 5 August 2011, paras. 79–80.
- 21 See the Chambers Practice Manual, 2023, paras. 96–97, in particular para. 96 (iii) and (iv): ‘(iii) In consideration of victims’ applications a high degree of discretion is afforded to Chambers. (iv) In the exercise of such discretion and depending on the number of victims applications, Chambers may adopt the so called A-B-C Approach under which the Registry classifies the applicants into three categories: (i) applicants who clearly qualify as victims (‘Group A’), (ii) applicants who clearly do not qualify as victims (‘Group B’); and (iii) applicants for whom the Registry could not make a clear determination for any reason (‘Group C’)’.

effect, even if they participated in the proceedings that gave rise to the appeal.²² As a result, victims wishing to participate in an interlocutory appeal were required to re-apply to do so. As noted by Judge Song, this approach 'leads to delays in the appellate process that are difficult to reconcile with the principle of expeditious proceedings'.²³ It has since fortunately been abandoned.²⁴

In addition, the role played by victims and their lawyers in the proceedings has been the subject of controversy. Defence teams routinely claim that victims' participatory rights should be limited so as to ensure that they are not equated with "second prosecutors", which would be contrary to the rights of the defendant and a fair and impartial trial.²⁵

However, the role of the victims is clearly distinct from that of the Prosecution,²⁶ and if their respective interests frequently converge – particularly concerning the

22 See e.g. *The Prosecutor v. Thomas Lubanga Dyilo*, No. ICC-01/04-01/06-1335 OA 9 and OA 10, Appeals Chamber, Decision, *in limine*, on victim participation in the appeals of the prosecutor and the defence against Trial Chamber I's decision entitled 'decision on victims' participation', 16 May 2008.

23 See *Situation in Darfur, Sudan*, No. ICC-02/05-138 OA OA2 OA3, Appeals Chamber, partially dissenting opinion of Judge Song, 18 June 2008, para. 5.

24 See *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, No. ICC-02/11-01/15-172 OA6, Appeals Chamber, reasons for the decision on the 'Request for the recognition of the right of victims authorized to participate in the case to automatically participate in any interlocutory appeal arising from the case and, in the alternative, application to participate', 31 July 2015, para. 16.

25 See e.g. *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-1711-tENG, Defence, response by the defence for Mathieu Ngudjolo Chui to the observations of the legal representatives of the victims on access to certain documents and the preparation of the examination of prosecution witnesses. Article 68(3) of the Statute, para. 10: '[a]ccessing material in the way in which they seek to do so would result in the Legal Representatives of the Victims being elevated to the status of second Prosecutors against the accused. That would upset the judicial balance by creating a real and manifest inequality of arms; the Defence would then be faced with a team of Prosecutors attacking it on all sides'.

26 As noted by Pre-Trial Chamber I, *'the Statute grants victims an independent voice and role in proceedings before the Court. It should be possible to exercise this independence, in particular, vis-à-vis the Prosecutor of the International Criminal Court so that victims can present their interests. As the European Court has affirmed on several occasions, victims participating in criminal proceedings cannot be regarded as 'either the opponent – or for that matter necessarily the ally – of the prosecution, their roles and objectives being clearly different'*. See *Situation in the Democratic Republic of the Congo*, No. ICC-01/04-101-tEN-Corr, Pre-Trial Chamber I, Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, 17 January 2006, para. 51. This approach was reiterated by Pre-Trial Chamber II. See *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Raska Lukwiyo and Dominic Ongwer*, No. ICC-02/04-01/05-155, Pre-Trial Chamber II, single Judge, Decision on 'prosecutor's application to attend 12 February hearing', 9 February 2007, p. 4. Finally, according to Judge Song, '[t]he victim of a crime has a particular interest that the person allegedly responsible for his or her suffering is brought to justice; this interest goes beyond the general interest that any member of society may have in seeing offenders held accountable. This interest of victims is acknowledged in the Statute and the Rules of Procedure and Evidence'. See the Separate Opinion of Judge Song, included *The Prosecutor v. Thomas Lubanga Dyilo*, No. ICC-01/04-01/06-925 OA8, Appeals Chamber, Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the 'Directions and Decision of the Appeals Chamber' of 2 February 2007, 13 June 2007, para. 13. Also see Schabas, 2017, pp. 333–359, and Scomparin, 2003, pp. 335–352.

discovery of the truth and the responsibility of perpetrators – it often happens that their views and attitudes differ on both procedural and substantive issues.²⁷

2. Frustrations by way of lessons that should be unlearned

2.1. Frustrations in relation to the participation of victims

The principle of the participation of victims in international criminal proceedings is no longer in dispute but, at this juncture, one could question whether it is fully effective. And indeed, the Court does not, lately, appear to be truly victim oriented.

The fragmentation of the legal framework regarding victim participation, and the ensuing unpredictability, is an important source of complexity which limits the victims' access to justice.

For example, the diverging practice of the Court regarding applications for participation is indicative in this respect. The VPRS, mandated to inform victims of their right to apply to participate in the proceedings and/or seek reparations, also assists them by developing standard application forms.²⁸ However, no certainty exists in this area given the proliferation of forms adopted to date. Initially, the form included 17 pages to be completed by victims. It was laborious, difficult to understand and limited to the issue of participation in the proceedings, with a separate form to be completed for reparations.²⁹ Subsequently, victims were to complete a seven-page form to participate in all phases of the proceedings, including reparations.³⁰ Thereafter, forms have been adopted in each of the separate cases pending before the

27 See e.g. the Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia in which the Office of Public Counsel for Victims (the "OPCV") opposed the decision of the Office of the Prosecutor not to open an investigation. See the Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia, No. ICC-01/13-65, OPCV, Victims' response to the application for judicial review by the Government of the Union of the Comoros, 29 March 2018. In the Gbagbo and Blé Goudé case, the victims and the Office of the Prosecutor have taken divergent positions with regard to the disclosure of certain information contained in the application forms compiled by victims. See e.g. The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé, No. ICC-02/11-01/15-915-Red OA9, Appeals Chamber, Judgment on the appeal of Mr Laurent Gbagbo against the oral decision on redactions of 29 November 2016, 31 July 2017. In the Ntaganda case, the legal representative of the former child soldiers challenged the Prosecutor's position that the international prohibition of rape and sexual slavery against recruits only covered child soldiers and argued that it should cover all recruits regardless of their age. See The Prosecutor v. Bosco Ntaganda, OPCV, No. ICC-01/04-02/06-Corr-Red, Closing brief on behalf of the former child soldiers, 7 November 2018, paras. 90–112.

28 See Regulation 86 of the Regulations of the Court.

29 This form was initially used in the Lubanga and Katanga and Ngudjolo Chui cases.

30 This form was used in all subsequent cases until 2012 when the "partially collective" approach was introduced in the Gbagbo case.

Court – although they tend to be similar to the ones used in the Ntaganda³¹ and Ongwen³² cases: a two-page application form with, as for the latest version thereof, a section dedicated to reparations.³³

It is therefore very difficult for the victims, or their legal representatives, to navigate this system because of the different standard forms – some similar, some not – that have been adopted by the Court. In turn, this fragmentation prevents them from applying to participate if they do not have access to the relevant information. Moreover, these forms are targeted to the specific needs assessed by each relevant Chamber, but not necessarily to the needs of legal representation. For instance, the simplified one-page-long form contains basic information allowing the relevant Chamber to rule *prima facie* on the victim status of the individual who filled out the form,³⁴ but does not always allow his or her lawyers, often appointed at a very late stage,³⁵ to best represent his or her interests.

Another important source of frustration for victims – and their lawyers for that matter – derives from the founding texts themselves in that victims cannot request leave to appeal decisions that impact their personal interests. This possibility is only provided for in relation to reparation orders.³⁶ It is very complicated to justify, let alone explain to the victims themselves, why they cannot appeal decisions that affect them directly, such as a decision not granting applicants the victim status that would allow them to participate in the proceedings, a decision denying authorisation to open an investigation, a decision by the Prosecutor not to open an investigation, or a decision not to grant them the status to participate in the proceedings. Not recognising these interests might result in irreparable prejudice to the victims awaiting justice. Not only would they have waited for years for the opening of an investigation into the crimes they suffered and the possible prosecution of the alleged perpetrators, but their reasonable expectation of seeking and obtaining justice would be lost, with no realistic alternative forum for redress available to them. Therefore, their only hope for redress in this instance is for the Prosecution to appeal, or seek leave to appeal, a remote possibility as the

31 See The Prosecutor v. Bosco Ntaganda, No. ICC-01/04-02/06-67-Anx, Pre-Trial Chamber II, Annex to the decision establishing principles on the victims' application process, 28 May 2013.

32 See The Prosecutor v. Dominic Ongwen, No. ICC-02/04-01/15-205-Anx, Pre-Trial Chamber II, Annex to the decision establishing principles on the victims' application process, 4 March 2015.

33 See The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, No. ICC-01/12-01/18-37-tEN, Pre-Trial Chamber I, Decision establishing the principles applicable to victims' applications for participation, 24 May 2018; and The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaissona, No. ICC-01/14-01/18-141, Pre-Trial Chamber II, Decision establishing the principles applicable to victims' applications for participation, 5 March 2019.

34 See The Prosecutor v. Bosco Ntaganda, No. ICC-01/04-02/06-449, Trial Chamber VI, Decision on victim participation at trial, 6 February 2015, paras. 30, 36, and 44.

35 See *infra*.

36 See Article 82(4) of the Rome Statute.

Prosecution seems less and less inclined to do so when it concerns matters affecting the interests of victims.³⁷

Most of the victims' frustrations appear to result from decisions by the different Chambers of the Court. But again, absent any possibility of appealing such rulings, the only possibility for a victims' lawyer like me is to raise awareness of these frustrations. I will just provide some examples of jurisprudence to illustrate why there are legitimate reasons to question the Court's victim-orientation.

Of course, one bears in mind some of the recent important decisions regarding the guilt or innocence of several accused persons before the Court. I am not, of course, questioning the outcomes of these proceedings which are integral to a functioning justice system and for which I personally prepare my clients from the outset of the proceedings. However, in some cases, the focus was not sufficiently placed on the needs of the victims: one naturally thinks about the acquittal on appeal, in June 2018,³⁸ of Mr Bemba, whereas the reparation proceedings were well underway two years after the initial conviction, and four years after closing the trial.³⁹ The acquittal of Messrs Gbagbo and Blé Goudé in January 2019,⁴⁰ on the other hand, was more problematic since no reasoning was issued until 16 July 2019,⁴¹ making it impossible for the victims' lawyers to explain the verdict to their clients for over five months.

In the same vein, the initial refusal of Pre-Trial Chamber II, in April 2018, to authorise the Prosecutor to proceed with an investigation in Afghanistan as it would not serve the interests of justice at the time, despite confirming the Court's jurisdiction over the crimes allegedly committed, tends to indicate that the Court is not victim centred.

37 Just to mention a few, see the absence of any reaction whatsoever on the part of the Office of the Prosecutor when Pre-Trial Chamber II did not confirm part of the charges in the Saïd case. See *The Prosecutor v. Mahamat Saïd Abdel Kani*, No. ICC/01/14-01/21-218-Red, Pre-Trial Chamber II, Public redacted version of decision on the confirmation of charges against Mahamat Saïd Abdel Kani, 9 December 2021. See also, in the same case, the absence of any reaction from the Office of the Prosecutor when Trial Chamber VI adopted an unprecedented scope of the charges restricting the possibility for victims to participate in the proceedings (*The Prosecutor v. Mahamat Saïd Abdel Kani*, No. ICC/01/14-01/21-472, Trial Chamber VI, Decision on the scope of the charges, 6 September 2022). See also *infra*.

38 See *The Prosecutor v. Jean-Pierre Bemba Gombo*, No. ICC-01/05-01/08-3636-Red, Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's Judgment pursuant to Article 74 of the Statute, 8 June 2018.

39 See *The Prosecutor v. Jean-Pierre Bemba Gombo*, No. ICC-01/05-01/08-3343, Trial Chamber III, Judgment pursuant to Article 74 of the Statute, 21 March 2016.

40 See *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, No. ICC-02/11-01/15-T-234-ENG ET, Trial Chamber I, Transcript of the hearing held on 15 January 2019.

41 See *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, No. ICC-02/11-01/15-1263, Trial Chamber I, Reasons for oral decision of 15 January 2019 on the *Requête de la Défense de Laurent Gbagbo afin qu'un jugement d'acquittement portant sur toutes les charges soit prononcé en faveur de Laurent Gbagbo et que sa mise en liberté immédiate soit ordonnée*, and on the Blé Goudé Defence no case to answer motion, 16 July 2019.

In addition, decisions on victims' participation in proceedings and on common legal representation are often adopted by Chambers at a very late stage.⁴² For example, the decisions concerning the participation of victims in the *Ntaganda* case were adopted between 15 January and 7 February 2014, while the hearings on the confirmation of charges started on 10 February 2014. Similarly, in the *Saïd* case, the appointment to represent the victims at the confirmation of the charges hearing was issued on 6 October 2022, six days prior to said hearing which took place from 12 to 14 October 2022. As for the trial proceedings, Trial Chamber VI appointed the victims' Common Legal Representative on 22 July 2022 for a trial starting on 26 September the same year, and the same Chamber only issued its final decision on the participation of victims more than a year after the start of the trial.⁴³

As a result of these very late appointments, the victims' lawyers concerned have very little time to familiarise themselves with all the documents submitted by the Prosecution over the course of several months, as they are only able to access the case file shortly before the start of the procedural phase in which the victims are allowed to participate. The same is true of the familiarisation with the Court's system (for external legal representatives),⁴⁴ with the clients' files and even more so with their clients themselves.

Further, Chambers often set very short deadlines for submitting observations on matters that directly affect the personal interests of victims – such as requests for the release of a defendant or issues concerning the Court's jurisdiction and the admissibility of cases. This often makes it impractical for lawyers to consult with the victims they represent – who reside in remote locations and are often difficult to reach – in order to be able to present their views and concerns. The deadline to respond to

42 For instance, the decision on the common legal representation of victims in the Bemba case was adopted on 10 November 2010, less than two weeks before the opening of the trial, which took place on 22 November 2010. (see *The Prosecutor v. Jean-Pierre Bemba Gombo*, No. ICC-01/05-01/08-1005, Trial Chamber III, Decision on common legal representation of victims for the purpose of trial, 10 November 2010). Similarly, the decisions concerning the participation of victims in the *Ntaganda* case were adopted between 15 January and 7 February 2014, while the hearings on the confirmation of charges started on 10 February 2014 (see respectively *The Prosecutor v. Bosco Ntaganda*, No. ICC-01/04-02/06-211, Pre-Trial Chamber II, Decision on victims' participation at the confirmation of charges hearing and in the related proceedings, 15 January 2014 and No. ICC-01/04-02/06-251, Second decision on victims' participation at the confirmation of charges hearing and in the related proceedings, 7 February 2014). More recently, the decision on the participation of victims and their legal representation in the *Saïd* case was issued 6 days prior to the opening of the confirmation hearing which took place from 12 to 14 October 2021 (see *The Prosecutor v. Mahamat Saïd Abdel Kani*, No. ICC-01/14-01/21-199, Pre-Trial Chamber II, Decision on victim applications for participation in the proceedings and on legal representation of victims, 6 October 2021).

43 See *The Prosecutor v. Mahamat Saïd Abdel Kani*, No. ICC-01/14-01/21-460-Red, Trial Chamber VI, Second decision authorising victims to participate in the proceedings, 8 November 2023.

44 In addition to acclimatising to life in The Hague, outside representatives need to be familiar with the fact that the Court is an electronic court. Therefore, a large number of computer systems must be mastered. See in this sense, *Behind the Scenes*, The registry of the International Criminal Court, 2010, pp. 19–21.

submissions, initially set at 21 days, was reduced to 10 days,⁴⁵ but in fact the relevant Chambers often further shorten this period to only a few days.⁴⁶ It is evidently simple for Defence counsel to confer with their respective clients – who are usually detained in the Scheveningen Prison, one kilometre away from the Court – but this consultation is much more difficult when legal representatives have to contact hundreds of people living in remote areas thousands of kilometres away from the Court, in situation countries, within a very short time frame.

What is more, very restrictive approaches have been adopted by Chambers concerning the geographical and temporal scopes of the charges which clearly do not take into account the full extent of the victimisation.

Victims have routinely questioned the scope of the charges included in existing arrest warrants⁴⁷ or the limited scope of the charges.⁴⁸ As such, they have systematically argued that the charges brought against accused persons represent an infinitesimal part of the crimes committed during the periods covered by the charges.⁴⁹ This directly impacts their rights as the very limited selection by the Prosecution of crimes included in the charges that were committed during relevant periods prevents a large number of victims from participating in the relevant proceedings. And one does not need to mention the recent plain and simple withdrawal of all charges against Mr Mokom by the Prosecution on 17 October 2023.⁵⁰

Even more worrisome is the recent jurisprudence of the Court with regard to the rights of victims to participate in proceedings,⁵¹ and the interpretation of the rel-

45 See Regulation 34(c) of the Regulations of Court.

46 See e.g. The Prosecutor v. Jean-Pierre Bemba Gombo, No. ICC-01/05-01/08-2030, Trial Chamber III, Decision shortening time for observations on the “*Requête de Mise en liberté provisoire de M. Jean-Pierre Bemba Gombo*”, 28 December 2011; and The Prosecutor v. Charles Blé Goudé, No. ICC-02/11-02/11-202, Trial Chamber I, Single Judge, Order reducing the time limit to file responses to ICC-02/11-02/11-201, 28 January 2015. However, most such decisions (of which there are many) are simply emailed to the parties and participants by the relevant Chambers.

47 See e.g. The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen, No. ICC-02/04-01/05-420-Red2, OPCV, Views and concerns of victims in relation to the proceedings against Mr. Dominic Ongwen, 26 January 2015.

48 See e.g. The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”), No. ICC-02/05-01/20-403-Red, Common legal representatives of victims, victims’ submissions under Rule 121(9) of the Rules of Procedure and Evidence, 24 May 2021; and The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona, No. ICC-01/14-01/18-336-Red, Common legal representatives of victims, *Soumissions écrites des Représentants légaux communs des Victimes en vertu de la règle 121-9 du Règlement de procédure et de preuve*, 15 October 2019.

49 See e.g. The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”), No. ICC-02/05-01/20-403-Red, common legal representatives of victims, victims’ submissions under Rule 121(9) of the Rules of Procedure and Evidence, 24 May 2021, paras. 27–42.

50 See The Prosecutor v. Maxime Jeoffroy Eli Mokom Gawaka, No. ICC-01/14-01/22-275, Office of the Prosecutor, Notice of withdrawal of the charges against Maxime Jeoffroy Eli Mokom Gawaka, 16 October 2023.

51 See in particular Articles 67(1) and 74(2) of the Rome Statute and regulation 52 of the Regulations of the Court.

evant founding texts by all other Chambers having ruled on participation of victims in the proceedings.⁵²

In September 2022, Trial Chamber VI issued a very restrictive decision on the scope of the charges in the Saïd case – limiting said scope to specific incidents confirmed by the Pre-Trial Chamber in its Confirmation Decision,⁵³ despite clear indication by the latter that ‘the specific criminal acts listed by the Prosecution in respect of the confirmed charges must not [...] be considered as definitive or exhaustive’ and that ‘the extent of the victimisation in connection with the confirmed charges [is] broader than the individual examples it specifically mentioned in the operative part of the Confirmation Decision’.⁵⁴ By virtue of this ruling, Trial Chamber VI ordered the Registry to proceed with reassessing all victim applications – including those of 20 victims already admitted to participate by the very same Chamber – arguing that in order to be granted participating status, victims need to demonstrate that ‘events described in the victims’ application forms correspond to at least one of the alleged crimes which have been confirmed’.⁵⁵

However, in accordance with the constant jurisprudence of the Court, in order to be allowed to participate in the proceedings, victims are simply required to demonstrate *prima facie* that they are victims within the meaning of rule 85 of the Rules of Procedure and Evidence, according to the following criteria: (i) the applicant has established his/her identity as a natural person; (ii) the applicant is alleged to have suffered harm; and (iii) the personal harm reported by the applicant resulted from an incident falling within the temporal, geographic and material parameters of the case.⁵⁶ Limiting the scope of the charges to specific incidents confirmed by the Pre-

52 See e.g. The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona, No. ICC-01/14-01/18-1391, Trial Chamber V, Fifteenth decision on victims’ participation in trial proceedings (Group A), 5 May 2022, para. 1, referring to The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona, No. ICC-01/14-01/18-141, Pre-Trial Chamber II, Decision establishing the principles applicable to victims’ applications for participation, 5 March 2019, paras. 29-41. See also The Prosecutor v. Bosco Ntaganda, No. ICC-01/04-02/06-211, Pre-Trial Chamber II, Decision on victims’ participation at the confirmation of charges hearing and in the related proceedings, 15 January 2014, para. 25; and Situation in the Democratic Republic of the Congo, No. ICC-01/04-101-tEN-Corr, Pre-Trial Chamber I, Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, 17 January 2006, para. 79.

53 See The Prosecutor v. Mahamat Saïd Abdel Kani, No. ICC-01/14-01/21-472, Trial Chamber VI, Decision on the scope of the charges, 6 September 2022. See also The Prosecutor v. Mahamat Saïd Abdel Kani, No. ICC-01/14-01/21-218-Red, Pre-Trial Chamber II, Decision on the confirmation of charges against Mahamat Saïd Abdel Kani, 9 December 2021.

54 See The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”), No. ICC-02/05-01/20-626, Pre-Trial Chamber II, Decision on the “Prosecution’s application to amend the charges”, 14 March 2022, para. 20. See also The Prosecutor v. Mahamat Saïd Abdel Kani, No. ICC-01/14-01/21-218-Red, Pre-Trial Chamber II, Decision on the confirmation of charges against Mahamat Saïd Abdel Kani, 9 December 2021.

55 See The Prosecutor v. Mahamat Saïd Abdel Kani, No. ICC-01/14-01/21-490, Trial Chamber VI, Order for the reassessment of victims’ applications, 27 September 2022, para. 6.

56 See e.g. The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona, No. ICC-01/14-01/18-1391, Trial Chamber V, Fifteenth decision on victims’ participation in trial proceedings (Group A), 5

Trial Chamber in its Confirmation Decision means that all other victims who were detained at the *Office Central de Répression du Banditisme* (Central Office for the Repression of Banditry) between 12 April 2013 and 30 August 2013 – while Mr Saïd, a senior member of the Seleka coalition, was *de facto* the head thereof – are no longer considered to be participating victims because they cannot show a direct link with the specific incidents listed as examples in the Confirmation Decision.⁵⁷

According to the victims participating in said case, this approach not only constitutes ‘an unprecedented step backwards for the rights of victims to participate in proceedings before the ICC’, but also clearly leads to an ‘absurd and discriminatory situation’.⁵⁸ Indeed, victims who demonstrate a *prima facie* link to the charges as confirmed by the Pre-Trial Chamber,⁵⁹ but no *prima facie* link to one of the incidents – as per the Chamber’s restrictive interpretation – are not allowed to participate in the proceedings despite having been detained during or around the same time as other victims who are allowed to participate in the proceedings because they fall within the scope of one of said incidents.⁶⁰

This jurisprudence, in and of itself, is sufficient to cast serious doubt on whether the approach adopted by judges can be deemed victim-centred, as mandated by the

May 2022, para. 1, referring to No. ICC-01/14-01/18-141, Pre-Trial Chamber II, Decision establishing the principles applicable to victims’ applications for participation, 5 March 2019, paras. 29-41. See also *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman* (“Ali Kushayb”), No. ICC-02/05-01/20-556, Trial Chamber I, First decision on the admission of victims to participate in trial proceedings, 14 January 2022, para. 4; *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, No. ICC-01/12-01/18-37-tENG, Pre-Trial Chamber I, single Judge, Decision establishing the principles applicable to victims’ applications for participation, 24 May 2018, para. 48; and *The Prosecutor v. Bosco Ntaganda*, No. ICC-01/04-02/06-650, Trial Chamber VI, Second decision on victims’ participation in trial proceedings, 16 June 2015, paras. 10 and 18.

57 In this sense, see *The Prosecutor v. Mahamat Saïd Abdel Kani*, No. ICC-01/14-01/21-310-Red, Common legal representative of victims, victims’ response to the prosecution’s application to amend the charges (ICC-01/14-01/21-294-Red), 16 May 2022. See also *The Prosecutor v. Mahamat Saïd Abdel Kani*, No. ICC-01/14-01/21-640-Red, Trial Chamber VI, Second decision authorising victims to participate in the proceedings, 8 November 2023.

58 See *The Prosecutor v. Mahamat Saïd Abdel Kani*, No. ICC-01/14-01/21-512, Common legal representative of victims’ response to the ‘Updated registry assessment report on previously transmitted victim applications for participation in trial proceedings’ (ICC-01/14-01/21-498), 24 October 2022, paras. 3, and 22-24; No. ICC-01/14-01/21-310-Red, Public redacted version of “Victims’ response to the ‘Prosecution’s application to amend the charges’ (ICC-01/14-01/21-294-Red)” No. ICC-01/14-01/21-310-Conf-Exp, dated 16 May 2022, paras. 16-19. See also *The Prosecutor v. Mahamat Saïd Abdel Kani*, No. ICC-01/14-01/21-657-Red, Common legal representative of victims, Public redacted version of “Victims’ observations on the ‘Report on the status of eight incomplete victim applications for participation in trial proceedings’” (ICC-01/14-01/21-650), No. ICC-01/14-01/21-657-Conf, dated 1 December 2023, 5 December 2023, para. 17.

59 See *The Prosecutor v. Mahamat Saïd Abdel Kani*, No. ICC-01/14-01/21-218-Red, Pre-Trial Chamber II, Decision on the confirmation of charges against Mahamat Saïd Abdel Kani, 9 December 2021.

60 See *The Prosecutor v. Mahamat Saïd Abdel Kani*, No. ICC-01/14-01/21-657-Red, Common legal representative of victims, Public redacted version of “Victims’ observations on the ‘Report on the status of eight incomplete victim applications for participation in trial proceedings’ (ICC-01/14-01/21-650) No. ICC-01/14-01/21-657-Conf, dated 1 December 2023, 5 December 2023, para. 17.

Rome Statute. Similar restrictive approaches have now been adopted with regard to the questions that victims' lawyers can pose to witnesses. For example, victims' lawyers are not allowed to ask general questions on the responsibility of the accused in the Yekatom and Ngaïsona case,⁶¹ whereas said questions directly concern the interests of their clients. In limiting the victims' right to question witnesses, the Presiding Judge clearly stated: 'questioning by the victims' representatives should restrict itself to the harm of the victims and not act, to put it figuratively, so to speak, as a prosecution *bis*'.⁶²

In the same vein, in the Saïd case, the victims' lawyer is not allowed to question insider witnesses. Indeed, while ruling on a request to question an insider witness who was present at the time of the detention of all direct victims, the Trial Chamber ruled that 'the proposed topics [for questioning] are too broadly formulated and do not specifically relate to victims she represents'⁶³ thereby expressly limiting the legal representative's questioning to 'matters relevant to the personal interests of the victims, such as harm the victim may have personally suffered or observed'.⁶⁴ These restrictions imposed on the questioning of witnesses demonstrate a very restrictive approach to victimisation by the judges of the Court and would appear to run against the established principle recalled *supra* that participation of victims needs to be effective, as opposed to symbolic.

These examples represent only a small portion of the dangerous trend that appears to be developing before the Court: principles are affirmed, namely that the participation of victims shall be meaningful – as opposed to symbolic – but it can be argued that, in reality, recent practice prevents victims from effectively enjoying their rights.

2.2. Frustrations in relation to reparation proceedings

As already mentioned, the right to request reparations for the harms suffered by victims constitutes the other "revolution" of the Rome Statute.

Indeed, historically, the harms suffered by victims of war were, in some cases, compensated through the payment of war indemnities to the Government of their country of origin, as the State is deemed to act on behalf of its nationals. However, despite the numerous conflicts of the second half of the 20th century, it was only in 1991 that the very first compensation system for victims of war by the State at fault

61 See The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona, No. ICC-01/14-01/18-631, Trial Chamber V, Initial directions on the conduct of proceedings, 26 August 2020, para. 19: 'Consequently, and irrespective of whether the Prosecution has elicited information on a certain point relevant to the alleged crimes, the CLRV's questioning is limited to matters relevant to the personal interests of the victims'.

62 See e.g. The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona, No. ICC-01-14-01-18-T-048-Red2-ENG CT WT, Transcript, 7 July 2023, p. 6, lines 8–10.

63 See The Prosecutor v. Mahamat Saïd Abdel Kani, No. ICC-01/14-01/21-T-017-Red-ENG CT, Transcript, p. 39, lines 20–21.

64 *Idem*, p. 39, line 25, to p. 40, line 1.

was created. The Security Council, in the aftermath of the Gulf War, set up a Commission to deal with the requests arising from the occupation of Kuwait and to decide on the compensation.⁶⁵ Today, in accordance with contemporary human rights law, it is generally recognised that victims of international crimes can claim reparations for the harm they have suffered. The Basic Principles on Reparation stipulates that victims are entitled to the following forms of reparation: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.⁶⁶ Therefore, the Rome Statute provides for the possibility to grant reparations to victims of atrocities.⁶⁷

Article 75 of the Rome Statute, which now provides for the possibility for judges of the Court to award reparations to victims, at the request of the victims or *proprio motu* without a specific request being made in this respect, is indeed a real innovation. Until the adoption of the Rome Statute, not a single international jurisdiction had ever granted reparations to victims for harm of any kind that they have suffered. For example, the Statutes and Rules of Procedure and Evidence of the International Criminal Tribunals for the former Yugoslavia and Rwanda only provided for the return of property to owners who had been defrauded,⁶⁸ while compensation for victims was expressly left to the discretion of the domestic courts.⁶⁹ Moreover, as with the *ad hoc* international tribunals, the Special Court for Serious Crimes in Timor-Leste and the Special Court for Sierra Leone do not have the power to order reparations, even though their Statutes were largely inspired by the Rome Statute.

When scrutinising the advancement of the reparation proceedings before the Court, it seems easy to congratulate ourselves for the implementation of the reparation orders in the Katanga and the Al Mahdi cases⁷⁰ which concerned a small number of victims⁷¹ and were geographically very circumscribed,⁷² and as such do not represent the normal extent of the cases pending before the Court.

65 See Resolutions 687 (1991) and 706 (1991) adopted by the Security Council respectively on 3 April 1991 and 15 August 1991.

66 See the Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law (2005).

67 See Article 75 of the Rome Statute.

68 Pursuant to Article 23(3) of the Statute of the International Criminal Tribunal for the Former Yugoslavia and Article 24(3) of the Statute of the International Tribunal for Rwanda, '[i]n addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners'. See also Rule 105 of the Rules of procedure and evidence of the International Criminal Tribunal for the Former Yugoslavia.

69 See common Rule 106 of the Rules of procedure and evidence of the International Criminal Tribunal for the Former Yugoslavia and of the Rules of procedure and evidence of the International Tribunal for Rwanda.

70 See the Report of the Board of Directors of the Trust Fund for Victims to the Assembly of States Parties on the activities of the Trust Fund for the period 1 July 2021 to 30 June 2022 (2022), para. 21.

71 According to the Report on the activities of the International Criminal Court (2023), 297 victims of the attack on the village of Bogoro (para. 42).

72 According to the Report on the activities of the International Criminal Court (2023), 1,450 victims solely in the city of Timbuktu (paras. 63–64).

Apart from these two cases, suffice to say that regarding the first case in which an accused was convicted that is, the Lubanga case, of 2,462 individuals deemed eligible, only 998 former child soldiers were benefiting from service-based reparations in the form of medical treatment, psychological rehabilitation and socio-economic support in 2023,⁷³ 20 years after the commission of the crimes they suffered when they were below 15 years of age and eight years after the Appeals Chamber instructed the Trust Fund for Victims (the "TFV") to present a draft implementation plan for collective reparations to the relevant Trial Chamber.⁷⁴ In the meantime, Mr Lubanga Dyilo was released after having served his sentence of 14 years of imprisonment on 15 March 2020, before reparations to victims were first implemented.⁷⁵

The absence of tangible results can also be deduced from the Ongwen reparation proceedings. In said case, the first submissions by victims on reparation issues took place in December 2021⁷⁶ and two years thereafter, no Reparation Order has been issued by the relevant Chamber. It certainly gives the impression that Trial Chambers consider that their job is done once they issue their sentencing decisions. However, the reparation phase is of paramount importance for the victims and the Rome Statute revolution concerns not only their participation in the proceedings but also the possibility for them to obtain reparations.⁷⁷

An additional important adverse impact on victims resides in the implementation by the TFV itself, which by virtue of article 75(2) of the Rome Statute is tasked with implementing reparation orders. Indeed, to date, victims have highlighted that the TFV's implementation of existing reparation orders seems somehow ineffective and insufficiently flexible to cover the evolving needs of victims throughout the years.⁷⁸ This is all the more problematic when the TFV is implementing reparation orders so long after their issuance. For example, in the Lubanga case, victims were consulted on their needs in 2012.⁷⁹ Since then, their needs have necessarily evolved and flexibility is therefore of paramount importance in designing reparation programmes.

73 See the Report of the Board of Directors of the Trust Fund for Victims to the Assembly of States Parties on the activities of the Trust Fund for the period 1 July 2022 to 30 June 2023 (2023), para. 28.

74 See *The Prosecutor v. Thomas Lubanga Dyilo*, No. ICC-01/04-01/06-3129-AnxA, Appeals Chamber, Order for reparations, 3 March 2015, para. 78.

75 See *The Prosecutor v. Thomas Lubanga Dyilo*, No. ICC-01/04-01/06-3524, Fifteenth progress report on the implementation of collective reparations as per Trial Chamber II's decisions of 21 October 2016, 6 April 2017 and 7 February 2019, 21 October 2021, para. 21.

76 See *The Prosecutor v. Dominic Ongwen*, No. ICC-02/04-01/15-1923-Red, OPCV, Common legal representative of victims' submissions on reparations, 8 December 2021 and No. ICC-02/04-01/15-1921, Legal representative of victims, Victims' preliminary submissions on reparations, 6 December 2021.

77 See Pellet, 2019, pp. 1651–1668.

78 See e.g. *The Prosecutor v. Thomas Lubanga Dyilo*, No. ICC-01/04-01/06-3554-Red, OPCV, Réponse du BCPV au Vingtième rapport de progrès sur la mise en œuvre des réparations collectives déposé par le Fonds au profit des victimes le 6 mars 2023 et à l'Addendum déposé le 17 avril 2023, 6 September 2023.

79 See e.g. *The Prosecutor v. Thomas Lubanga Dyilo*, No. ICC-01/04-01/06-2863, OPCV, Observations on issues concerning reparations, 18 April 2012.

Indeed, a former child soldier who was 20 at the time of the issuance of the initial Reparation Order might have expressed their willingness to be allotted school fees in order to resume their studies. Absent any implementation for ten years, now aged 30, their priority might no longer be the continuation of their education, but more probably the need to find a job or resources to support their family.

Moreover, in addition to the time elapsed, the implementing partners and the TFV have on occasions unilaterally adapted their programmes, thereby creating an additional source of frustration for victims.⁸⁰ To avoid such an issue, the victims' lawyers have insisted on the necessity to put in place clear and transparent processes for the benefit of victims' participation and involvement in the reparations programmes in order to guarantee that victims and affected communities are not confronted with any type of uncertainty when it comes to the content and methodologies of access to reparations. Communication is also an important factor in keeping beneficiaries adequately informed to avoid frustration and envy. This would hopefully allow for the avoidance of tensions and misunderstandings as to the extent of reparations measures, and the appearance, perceived or real, of discrimination amongst victims in cases where significant periods of time are required for measures to be implemented.⁸¹

* *

Despite naysayers of all sorts, victims have the right to participate in proceedings and to benefit from reparations. They should be able to enjoy these rights in a comprehensive and straightforward manner. Twenty-five years after the adoption of the Rome Statute, perhaps it is time for all the actors before the Court to get back to basics, namely the recognition that 'millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity', that 'the most serious crimes of concern to the international community as a whole must not go unpunished' and that the ICC was specifically established 'for the sake of present and future generations'.⁸² Perhaps it is time to allow the victims to fully enjoy their rights, and even to broaden their role in the proceedings. Justice could benefit greatly from listening carefully to the voices of victims.

80 See e.g. The Prosecutor v. Thomas Lubanga Dyilo, No. ICC-01/04-01/06-3533-Red, TFV, Seventeenth progress report on the implementation of collective reparations as per Trial Chamber II's decisions of 21 October 2016, 6 April 2017 and 7 February 2019, 4 May 2022, para. 25. See also in the same case, No. ICC-01/04-01/06-3531-Red, Legal Representatives of Victims, *Réponse commune des Représentants légaux des victimes au Seizième Rapport sur le progrès de la mise en œuvre des réparations collectives déposé par le Fonds au profit des victimes le 4 février 2022*, 17 March 2022.

81 In this sense, see e.g. The Prosecutor v. Thomas Lubanga Dyilo, No. ICC-01/04-01/06-3554-Red, OPCV, *Réponse du BCPV au Vingtième rapport de progrès sur la mise en œuvre des réparations collectives déposé par le Fonds au profit des victimes le 6 mars 2023 et à l'Addendum déposé le 17 avril 2023*, 6 September 2023.

82 See Rome Statute, Preamble.

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NON-STATE ACTORS AND INTERNATIONAL CRIMINAL LAW



RUTVICA RUSAN NOVOKMET

Abstract

The legal position of non-state actors in international law has been on the agenda of international scholars for several decades, particularly in terms of defining various kinds of non-state actors, clarifying the issue of their international legal personality, and, ultimately, addressing the most controversial question – that of their international responsibility. In this context, the author analyses the position of armed opposition groups as a specific category of non-state actors in situations of non-international armed conflicts, in which violations of international law frequently occur. The author thus defines the international legal framework relevant for the regulation of the rights and duties of these non-state actors, and places special emphasis on violations of international legal norms amounting to the most serious international crimes. The author warns that there is a legal lacuna in respect of the international responsibility of armed opposition groups since the international criminal law framework still does not offer adequate legal and institutional mechanisms for holding them directly accountable as groups. However, the reality of international relations and the enormous extent and gravity of international crimes committed by armed opposition groups in armed conflicts advocate for recognition of their direct international responsibility. Such a view is supported by an increasing number of scholars, the jurisprudence of international courts and tribunals, and Security Council decisions, all of which are analysed in this paper. The author concludes that, in order to complement the international criminal justice framework, all

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the aforementioned actors should enhance their cooperation and find more suitable solutions for explaining the role of armed opposition groups as collectives in the commissioning of international crimes, as well as for defining the prerequisites for their direct international responsibility. The author also offers possible solutions in this regard.

Keywords: non-state actors, armed opposition groups, international humanitarian law, international human rights law, international crimes, direct international criminal responsibility

1. Introduction

The issue of the position of non-state actors (NSAs) in international relations can be approached from many different perspectives and scientific fields, depending on the specific problem that forms the focus of the research. The subject of this paper is the analysis of NSAs within the international criminal law framework, i.e. the analysis of a particular category of NSAs who are frequently in a position to commit the most serious international crimes (war crimes, crimes against humanity, genocide). This issue, however, is still rather controversial in both legal theory and international criminal jurisprudence since there are still no adequate mechanisms available for holding them directly accountable for these crimes.

In order to explore how NSAs fit or do not fit within the international criminal framework, we must start from the perspective of international public law and choose an adequate definition of NSAs relevant for the application of certain international legal rules, violations of which can amount to international crimes. The International Law Commission dealt with various aspects of NSAs' activities trying to clarify whether they have any international rights and duties, i.e. whether they have an international legal personality (section 2). In this context, we use the term NSAs to refer to armed opposition groups participating in non-international armed conflicts and that often commit violations of international law to the detriment of civilians. Furthermore, we analyse the international legal framework relevant for the regulation of the rights and duties of these NSAs, particularly the rules of international humanitarian law applicable in non-international armed conflicts, as well as the rules of international human rights law. As will be explained in more detail later in the paper (section 3), the fact that the rules of international humanitarian law apply to all parties to an armed conflict is widely accepted in legal theory and has been confirmed in numerous decisions of international courts and tribunals. Decisions adopted by the UN Security Council are also of particular significance in this context. On the other hand, it is still rather disputable in theory whether the rules of human rights law are applicable to NSAs, since according to the still prevailing point of view, states are the primary holders

of human rights obligations. However, we will explain that under certain conditions, NSAs can also have international obligations towards individuals under their control.

The crucial issue under consideration, however, is violations of international legal norms committed by NSAs, which amount to the most serious international crimes. In this context, the central questions posed in this paper, and analysed in section 4, are the following: are armed groups responsible as collectives for violations of international law? Can they be held accountable for international crimes, such as war crimes, crimes against humanity, genocide and torture? How can theory bridge the legal *lacuna* in which there are still no legal mechanisms for determining their international criminal responsibility as groups, as opposed to the responsibility of a state or an individual?

There are still no definite answers to these questions; however, we will try to demonstrate how some alternative legal mechanisms can be used to arrive at the conclusion that armed groups are not only bearers of international obligations but are also internationally responsible as groups for international crimes committed in armed conflicts (section 5). Their international responsibility can be deduced indirectly, through the determination of the international responsibility of a state based on the attribution of internationally wrongful acts committed by NSAs. On the other hand, the establishment of the international criminal responsibility of individual members of a group can also contribute to a finding of the group's indirect responsibility for enabling the commission of crimes by its members. These considerations can serve as the starting point for further development of international criminal law and the search for more suitable solutions in explaining the role of NSAs as groups in the commission of international crimes, as well as the prerequisites for their direct international responsibility (section 6).

2. Non-state actors as subjects of international law

One of the consequences of the globalisation process is the weakening of the *de facto* power of states and the loss of state control over developments, both within their territory and on the international level. This has paved the way for the inclusion of many new actors, organisations and institutions in the international arena, conducting their activities more or less autonomously and outside the control of the state's central government.¹ The International Law Commission's Committee on

1 This group of NSAs also includes organisations that participate in cross-border activities, that are oriented towards creating transnational relationships, and that connect with different political systems, economies, and societies, thus intentionally or non-intentionally influencing political trends in one or more states and/or international organisations. See more in Josselin and Wallace, 2001, pp. 3–4.

Non-State Actors (the ILA Committee), established in 2007, dealt with the issue of the position of various NSAs in international law, focusing on the identification of their international rights and obligations and their place in the framework of international responsibility. The ILA Committee confirmed that the common feature of all NSAs is their autonomy from state power, and that their establishment and activities are independent of the state's political influence, control and financing. For the purpose of its research, the ILA Committee offered a working definition of NSAs, according to which NSAs are 'legally recognised and organised entities that are not comprised of nor governed or controlled by states nor groups of states and that actually perform functions in the international arena that have real or potential effects on international law'.² Five categories of NSAs are included in the ILA Report of 2010 based on this definition: (a) non-governmental organisations (NGOs); (b) multinational enterprises (MNEs) or transnational corporations (TNCs); (c) organised armed opposition groups (AOGs), rebel groups, insurgent and belligerent groups, and parties to an internal conflict that reaches the threshold for the applicability of international humanitarian law, as well as national liberation groups; (d) *sui generis* or unique entities (such as the Holy See or the International Committee of the Red Cross) and (e) organised groups of indigenous peoples.³

Although each of these categories of NSAs undoubtedly brings some new challenges in international relations, as well as in the development and adaptation of the international legal framework with regard to the issues of their international legal personality and their international responsibility, the assigned topic of the position of NSAs in international criminal law directs our focus to NSAs who, by the nature of their activities and goals, are most closely related to violations of international legal norms, often amounting to international crimes. In this context, our focus is on AOGs participating in non-international armed conflicts, which, according to the ILA Committee, are defined as 'collective entities that use organised military force, have an authority responsible for their acts, and have the means of respecting and ensuring at least the rules of international humanitarian law (...). They are generally engaged in protracted armed violence with the Government of a State, or with another armed opposition group, typically in the context of a(n) (international or non-international) armed conflict'.⁴ The activities of this particular category of NSAs quite often involve violations of international law due to the use of armed force in the realisation of their primary goals: the establishment of territorial control and/or

2 Brus and Kunzelmann, 2017, p. 612. The ILA focused on actors who actually perform functions in the international arena and who have real or potential effects on international law. ILA Report, 2010, p. 637.

3 ILA Report, 2010, pp. 637–638.

4 ILA Report, 2014, p. 690. See also ICTY, 1995, para. 70, where the ICTY explained that '(...) an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State'. On the existence of an armed conflict, whether international or non-international, as a factual question, on which the application of the rules of the international humanitarian law depends, see Akande, 2012, pp. 40–44.

taking over the government, or the establishment of some level of autonomy on part of the state's territory.

Therefore, it is crucial not only to analyse the issue of the legal position and the international legal personality of armed groups as NSAs under international law, but also to detect the current stance of the law concerning the establishment of their international responsibility for violations of international law and identify possible solutions to bridge the legal gap with regard to their direct international responsibility for international crimes.

3. The international legal framework applicable to non-state actors in non-international armed conflicts

Theoretical understanding of the concept of international legal personality has drastically changed during the 20th century, when the state-centric comprehension of international subjectivity ceased to dominate. One of the accepted definitions of international legal persons is the one that describes them as entities 'possessing the capacity to have and to maintain certain rights and being subject to perform specific duties'.⁵ However, we must bear in mind that it is the function of the law to apportion rights and duties to such entities as it sees fit. Therefore, the recognition of the international legal personality of AOGs as NSAs depends on their influence on international relations, the needs of the international community and international law, as well as the circumstances in which it is important to assign concrete rights and/or obligations to particular participants in the international arena.⁶

A major change in the doctrinal understanding of the legal personality under international law was brought about by the Advisory Opinion 'Reparation for Injuries Suffered in the Service of the United Nations' of the International Court of Justice (further in the text: "ICJ", "the Court"), in which the Court accepted a functional approach, confirming that legal subjects of any legal system are not identical, and that they differ in their nature and in their rights, which depend on the needs of the community.⁷ They all participate in international relations and

5 Shaw, 2008, p. 195.

6 Shaw mentions human rights law, international law of armed conflicts and international economic law as especially important branches of international law in generating and reflecting increased participation and personality in international law. Ibid. p. 197. On the concept of international legal personality in general, see Crawford, 2019.

7 Furthermore, the Court explains that international law develops under the influence of the requirements of international relations and the inclusion of some other entities that are not states. ICJ Reports, 1949, p. 178. These conclusions are valid not only for the UN and for other international organisations but for other entities having international legal personality as well, such as international liberation movements, insurgents, *sui generis* entities, individuals etc. Andrassy, Bakotić, Seršić, and Vukas, 2010, pp. 65–179.

contribute to the creation of the international legal rules, thus reaffirming the constant development and adaptation of the international legal framework to new actors who play non-negligible roles both on the national and international level.⁸

The question of the substantive rights and duties of NSAs, however limited they might be, is inextricably linked to the question of their legal personality. It is widely accepted that AOGs participating in non-international armed conflicts are subject to a particular set of international legal rules because they are belligerents in armed conflicts, being thereby obliged to respect the rules of international humanitarian law. This is primarily dependent on a group's level of organisation, the existence of a military command structure, the *de facto* administration and control of a part of a state's territory, and the intensity of hostilities relevant for the activation of the international law of armed conflicts.⁹ Their international legal personality is also manifested in their capacity to conclude international agreements (*jus contrahendi*) with the Government of a State against which they are fighting, or with other armed groups parties to the conflict, with the purpose of regulating certain aspects of the conduct of hostilities and the protection of civilians.¹⁰

In the next two paragraphs, we will demonstrate how and to what extent AOGs are bound by the rules of international humanitarian law, and also by the rules of human rights law, which, as we will explain further in the text, is a more disputable issue. In any case, it is important to underline that international humanitarian law and human rights law are oriented on the protection of the fundamental principles of humanity and the efficient protection of human beings, both in time of peace and time of war.¹¹

3.1. International humanitarian law

Looking at the legal position of NSAs and possible obligations that they might have under international law, there is no doubt anymore that there are rules that, although primarily related to states and international organisations as the main international actors in the creation and implementation of international law, directly address other subjects as well. International humanitarian law, which regulates the rights and obligations of belligerents in armed conflicts, contains the rules applicable to AOGs participating in non-international armed conflicts.¹²

8 Clapham identified four reasons for the rise of NSAs in the international legal arena: globalisation of the world economy, privatisation of sectors which were dominantly governed by states in the past, fragmentation of states' power on the use of armed force, and feminisation of international law and international relations. Clapham, 2006, pp. 3–19.

9 ICTY, 2008, para. 60.

10 Rynjaert and Van de Meulebroucke, 2012, p. 453 et seq. Some authors refer to agreements concluded between NSAs and the Government of a State as internationalised agreements. See, for example, Kooijmans, 1998, pp. 338–339. The applicability of the agreements entered into by the parties to a conflict was confirmed in the jurisprudence of the ICTY. See ICTY, 1995, para. 143.

11 Meron, 1984, p. 21.

12 Depending on a particular group's degree of organisation and the hierarchical division of functions

Although common Article 3 of the four Geneva Conventions on the protection of victims of war is rather unspecific in terms of the definition of concrete actors participating in non-international armed conflicts,¹³ its incorporation in the Geneva Conventions undoubtedly represents a breakthrough in the process of the codification of international humanitarian law. One of the reasons for such an appraisal is the fact that this provision explicitly obliges all parties to an armed conflict occurring within the territory of a state to respect the minimum standards of humanity and humane behaviour, thus preventing them from escaping the responsibility to act within the mentioned limitations and demands of law.¹⁴ Therefore, the existence of a non-international armed conflict is the main requirement for the application of these rules to all parties to such a conflict.¹⁵ This has been confirmed in the ICJ's jurisprudence on several occasions, for example in the Nicaragua case.¹⁶ Furthermore, it is important to emphasise that the recognition of insurgents as belligerents is no longer a necessary precondition for the application of common Article 3 of the Geneva Conventions, as well as of the Protocol II Additional to the Geneva Conventions of 1977.¹⁷

The other proof of the significance of common Article 3 is the confirmation of its customary character, particularly because AOGs as NSAs cannot become parties to the Geneva Conventions. The jurisprudence of the ICJ and the ICTY is extremely

within the group, as well as their recognition by the government or other states, one can distinguish rebels, insurgents and belligerents. For more details on this differentiation, see Andreopoulos, 2006, pp. 141–142, 157. See also ILA Report, 2014, p. 691.

- 13 Common Article 3 of the four Geneva Conventions reads as follows: *"In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions"* (...). See four Geneva Conventions, 1949, Article 3.
- 14 Article 3, para.1 prescribes the following prohibitions: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Geneva Conventions, 1949, Article 3, para. 1.
- 15 The criteria for the identification of an armed conflict as a non-international one are determined during the diplomatic conference in Geneva. See Pictet, 1952, pp. 49–50. See also Commentary of Additional Protocol II, 1987, para. 4459.
- 16 The ICJ explained: (...) *they are rules which, in the Court's opinion, reflect what the Court in 1949 called "elementary considerations of humanity"* (...). Furthermore, the Court said that Common Article 3 provisions, as they are identical for both the parties to an international, as well as to a non-international armed conflict, bind the members of the *contras* (an armed group in Nicaragua). ICJ Reports, 1986, paras. 218, 219. See also ICJ Reports, 1949, para. 22.
- 17 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1977. Clapham, 2006, pp. 271–273; Andrassy et al., 2010, p. 101. This provision of international law has mostly disappeared from practice and no longer has any legal significance. Meron, 1987, p. 50. However, there are some recent examples of the recognition of insurgents as belligerents, such as the recognition of the Sandinistas in Nicaragua in 1979, the insurgents in El Salvador by France and Mexico in 1981, and the Revolutionary Armed Forces of Colombia (FARC) in Colombia by the Venezuelan government in 2008. For more details, see Akande, 2012, p. 50; Mastorodimos, 2013, pp. 306–307.

valuable in this regard.¹⁸ Regarding the Additional Protocol II to the Geneva Conventions, although it does not record a universal acceptance among states, as is the case with the Geneva Conventions, international jurisprudence has confirmed that the majority of its provisions reflect the existing legal rules, are emerging customary rules or represent a manifestation of general principles of law.¹⁹ The purpose of these rules is the protection of victims of non-international armed conflicts, as well as of the vital humanitarian interests of states and other actors in the international community, the application of which must not depend on the sole discretion of the parties to armed conflicts.²⁰

The inclusion of serious violations of common Article 3 of the Geneva Conventions in non-international armed conflicts, as well as other serious breaches of the laws and customs of war in such conflicts, as war crimes in the Statute of the International Criminal Court (the Rome Statute, the ICC) represents a clear confirmation of the obligatory character of these rules for all parties to non-international armed conflicts and, more importantly, of the existence of responsibility for their violations. According to Article 8, para. 2 (f) of the Rome Statute, armed conflicts not of an international character are defined as ‘armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups’.²¹ Such a definition of non-international armed conflicts, i.e. the ones which, along with the traditional types of conflicts, also include conflicts conducted only between organised armed groups, enables the application of the provision of Article 8 to a broad range of armed conflicts.

- 18 The ICTY confirmed in the case *Prosecutor v. Duško Tadić*: ‘*The emergence of international rules governing internal strife has occurred at two different levels: at the level of customary law and at that of treaty law. Two bodies of rules have thus crystallized, which are by no means conflicting or inconsistent, but instead mutually support and supplement each other. Indeed, the interplay between these two sets of rules is such that some treaty rules have gradually become part of customary law. This holds true for common Article 3 of the 1949 Geneva Conventions, as was authoritatively held by the International Court of Justice (Nicaragua Case, at para. 218)*’. ICTY, 1995, para. 98.
- 19 ICTY, 1995, para. 117. The comparison of the scope of application of common Article 3 of the Geneva Conventions and Additional Protocol II, particularly with regard to the definition of the parties of non-international armed conflicts, is given by Matas, 1996/1997, pp. 621–664.
- 20 On the obligatory character of certain rules of international customary law in relation to armed groups as international persons, see Kleffner, 2011, pp. 454–456; Bellal, Giacca and Casey-Maslen, 2011, pp. 55, 62–63. The ICRC has also confirmed that many rules of international humanitarian law have crystallised into customary international law applicable in both international and non-international armed conflicts as a result of widespread, representative and virtually uniform practice. Henckaerts, 2005, p. 189. For the overview of different doctrines explaining the legal basis for the obligatory character of international humanitarian law rules on armed opposition groups, see Rynjaert, 2011, pp. 284–294.
- 21 The full text of Article 8, para. 2 (f) of the Rome Statute reads as follows: ‘Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups’. Rome Statute, 1998.

The exclusion from the Rome Statute of the requirement for territorial control or the involvement of the government in such conflicts reflects the awareness of states participating at the diplomatic conference in Rome that such a criterion is inadequate and even irrelevant in contemporary non-international armed conflicts. This is because the parties to non-international armed conflicts do not necessarily respect state borders in the course of their activities. In addition, the protection of civilians – those most at risk in all armed conflict – must be the *ultima ratio* of legal protection.²²

The decisions adopted within the UN organs, especially the Security Council, also contribute to the awareness that NSAs (AOGs) are bound by the rules of international humanitarian law. On many occasions, the Security Council has called upon various NSAs, in accordance with the requirements of Chapter VII of the UN Charter, to respect the rules of international humanitarian law for the protection of civilians, particularly the Geneva Conventions.²³ Although there is no consensus among scholars on whether the resolutions adopted by the Security Council, even in the context of Chapter VII, are legally binding on AOGs as NSAs, their significance cannot be denied, particularly in cases where the Security Council explicitly condemns violations of international law committed by all parties to a conflict. Moreover, in these “smart” sanctions, the Security Council categorises such violations as a threat to the peace, thus making AOGs the target of enforcement measures contained in the UN Charter for the purpose of maintaining the international peace and security.²⁴

Undoubtedly, the confirmation in the Security Council resolutions that AOGs have obligations under international humanitarian law and that they must end all violations of these obligations helps in the development of awareness that both states and AOGs are obliged to conduct their activities in accordance with the rules of international humanitarian law and are responsible for any breaches committed. In addition, the extent to which such actions by the Security Council can help afford more efficient protection for civilians in armed conflicts should not be underestimated.²⁵

- 22 Triffterer and Ambos, 2016, pp. 313–314, 575–576; Sivakumaran, 2009, pp. 363–380. Schabas points to the commentary of the ICRC, that the implementation of the criterion of territorial control would mean a step back in the international legal regulation of armed conflicts, and that that would prevent the ICC from conducting proceedings in relation to crimes committed in many recent armed conflicts. Schabas, 2010, pp. 204–206.
- 23 See, for example, Security Council resolution 864 (1993) referring to the situation in Angola and the activities of the insurgent group UNITA (The National Union for the Total Independence of Angola), resolution 1343 (2001) against Liberia, which collaborated with the Sierra Leone insurgent group RUF (Revolutionary United Front), and resolution 1556 (2004) against the Janjaweed militia, which committed numerous violations of human rights and the rules of international humanitarian law in Darfur, Sudan.
- 24 On the development of the so-called “smart sanctions”, see Bolani, 2003, pp. 401–439; Lapaš and Rusan Novokmet, 2018, pp. 34–48.
- 25 The role of the UN Secretary-General in the protection of civilians in armed conflicts is also very important, particularly in terms of providing support to the Security Council. In the most recent report, the Secretary-General particularly emphasised that the protection of civilians depends on adherence to the applicable rules of international humanitarian law and human rights law. He has

3.2. *International human rights law*

International human rights law primarily binds states in relation to individuals under their jurisdiction. The applicability of international human rights law to NSAs is still a rather controversial concept. However, more and more international lawyers and practitioners advocate for the view that certain NSAs, such as AOGs in non-international armed conflicts, are bearers of some duties under human rights law, even though they cannot become parties to human rights treaties. The factors that influence the existence of such obligations are the degree of *de facto* control of part of a state's territory by armed groups and their performance of governmental functions.²⁶ This is based on the conclusion that AOGs have the duty to respect human rights where the legitimate government, particularly in circumstances of an armed conflict, is unable to provide legal protection to its citizens, perform its public functions or implement territorial control.²⁷ What is even more important, the *ratio* for the expansion of the rules of international human rights law to NSAs is to bridge the legal gap that emerges in situations of incompatibility between the broad powers of AOGs and the possibility of holding them accountable for violations of human rights, which unfortunately often occur in times of an armed conflict.²⁸ Otherwise, if certain actors were to remain outside the framework of human rights obligations and accountability for violating those obligations, mechanisms for human rights protection would be very limited and inefficient.

The view that AOGs are addressees of human rights obligations is supported by numerous resolutions adopted by the Security Council, in which the Council condemned violations of both international humanitarian law and human rights law by AOGs, and expressed its stand that it holds them responsible for the violations of these rules.²⁹ Moreover, the Security Council confirmed that parties to an armed conflict bear the primary responsibility for the implementation of all possible measures for the protection of civilians, and called upon them to strictly respect their obligations arising from international humanitarian law, human rights law and refugee

also called upon states and NSAs to conclude the relevant treaties and incorporate their international humanitarian law and human rights law obligations into their national laws, military manuals, codes of conduct, and other rules relevant to their activities. UN Secretary-General Report, 2023, para. 90. See also UN Secretary-General Report, 2015, para. 59.

26 Zegveld, 2002, pp. 148–149; Henckaerts and Nohle, 2018, p. 31.

27 Ronen, 2013, pp. 21 et seq.

28 Ibid. p. 24.

29 For example, in Resolution 1417 (2002) the Security Council condemned ethnically and racially based calls for violence, killings and attacks against civilians and soldiers by the RCD-Goma (Rassemblement Congolais pour la Démocratique-Goma) in Congo, explicitly mentioning that it holds this group, 'as the *de facto* authority, responsible to bring to an end all extrajudicial executions, human rights violations and arbitrary harassment of civilians in Kisangani (...)'. Security Council Resolution 1417 (2002), para. 4. See also Constantinides, 2010, pp. 89-110, who explains the role of the Security Council in the extension of human rights obligations to armed groups in control of a territory.

law.³⁰ The General Assembly also contributed to the understanding that NSAs have certain human rights obligations in the UN Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, where it stated that this document was ‘a guideline for all States and other entities exercising effective power’.³¹ The Office of the United Nations High Commissioner for Human Rights also emphasised that the understanding of the responsibility of NSAs for human rights violations is a reflection of a pragmatic acceptance of the reality of armed conflicts, without which individuals would lose any possibility of claiming their rights.³²

However, these assertions are not without certain deficiencies. For one, it is quite difficult to imagine that AOGs have the same resources or capacities as states do to implement these obligations. This is the factor that can aggravate their ability to effectively exercise political authority over the population living in a part of a state’s territory.³³ Another problem lies in the possible unwillingness of a state to acknowledge that such NSAs actually exercise territorial control, thus denying them state-like entitlements.³⁴ The consequence of such a situation is that some armed groups cannot be held responsible under human rights law.

Nevertheless, it is not superfluous to remind ourselves that many obligations under human rights law have a *jus cogens* character, which means that they are imperative norms, from which no derogation is allowed. The prohibition of slavery, the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, the prohibition of racial discrimination, and respect for the principle *nullum crimen, nulla poena sine lege* are just some of the rules recognised in the International Covenant on Civil and Political Rights, which cannot be abolished in any circumstance, not even in time of armed conflict.³⁵ Some international bodies, such as the Human Rights Committee or the UN Commission on Human Rights, have confirmed the applicability of the obligations contained in this treaty to NSAs.³⁶ The protection of human beings and human dignity remains the fundamental principle and the ultimate objective of legal protection in times of armed conflict.

30 Security Council Resolution 1894 (2009), preamble and para. 1. In Resolution 1564 (2004) the Security Council emphasised that ‘the Sudanese rebel groups (...) must also take all necessary steps to respect international humanitarian law and human rights law’.

31 General Assembly Resolution 3452 (1975), preamble.

32 Office of the UN High Commissioner for Human Rights, 2011, p. 25.

33 Ibid. p. 149. Armed opposition groups might lack the infrastructure to guarantee a fair trial or to conduct effective investigations of torture or extrajudicial killings. ILA Report, 2014, p. 693.

34 States fear that the recognition of armed groups having *de facto* control over a part of the state’s territory might give them some kind of legitimacy. Instead, they prefer to treat them as illegitimate, criminal individuals or groups. Clapham, 2006, pp. 271–273; Cassese, 1981, pp. 426 et seq. See also ICTY, 1995, para. 96.

35 International Covenant on Civil and Political Rights, 1966, Articles 4, 7, 8, 11, 15, 16.

36 Zegveld, 2002, pp. 149–150.

4. Issues of the international responsibility of non-state actors

In the previous chapters we have analysed the position of AOGs as NSAs in armed conflicts and concluded that not only are they international subjects having certain obligations under international humanitarian law, and, under certain conditions, international human rights law, but that they are capable of violating those obligations and being held internationally responsible for so doing. These conclusions are supported by international lawyers, who explain the role of the needs and changes in modern society, which affect the development of international law, and by the interpretations and decisions of international courts and tribunals, backed up by the various UN organs.

The central questions posed in this paper are: if the violations committed by AOGs amount to international crimes, can they, as groups, be held criminally responsible for them? How do they fit into the framework of international criminal law? How does international criminal law treat groups responsible for international crimes?

There are no clear and simple answers to these questions. First of all, the concept of criminal responsibility is primarily related to individuals, physical persons. Indeed, this fundamental principle of international criminal law was confirmed at the very beginning of the development of the concept of individual international criminal responsibility, in the judgement of the International Military Tribunal in Nuremberg in 1946. In its judgement, the Tribunal explained: 'Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced'.³⁷ It is also worth mentioning the Genocide Convention in this context, which prescribes individual criminal responsibility for genocide, as well as the competence of national and international courts to decide on the responsibility of persons accused of this crime.³⁸ On the other hand, some national legal systems also provide for the criminal responsibility of legal persons as collectives, such as political parties or companies. The idea of including legal persons in the *ratione personae* jurisdiction of the ICC was also discussed at the diplomatic conference in Rome, with the argument that such a solution would be important in terms of restitution and compensation for victims. However, the proposal was ultimately not accepted in the final text of the Rome Statute.³⁹ A significant step forward in the development of the criminal responsi-

37 ICC Legal Tools, [chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.legal-tools.org/doc/45f18e/pdf/](https://www.legal-tools.org/doc/45f18e/pdf/) (Accessed: 12 January 2025). See also Schabas, 1998, p. 409.

38 Convention for the Prevention and Punishment of the Crime of Genocide, 1948, Articles IV and VI. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 also provides for the criminal responsibility of an individual.

39 The proposed provision reads as follows: 'Without prejudice to any individual criminal responsibility of natural persons under this Statute, the Court may also have jurisdiction over a juridical person for a crime under this Statute'. See United Nations Diplomatic Conference of Plenipotentiaries on the

bility of legal persons on the international level was the inclusion of such a provision in the Draft Articles on Prevention and Punishment of Crimes against Humanity, adopted by the International Law Commission in 2019. Article 6, paragraph 8 obliges each state, subject to the provisions of its national law, to take measures to establish the liability of legal persons for crimes against humanity, which may be criminal, civil, or administrative.⁴⁰ On the other hand, a state can also be held responsible for genocide under the Genocide Convention.⁴¹

As regards the existence of secondary rules of international law establishing the responsibility of AOGs for violations of international humanitarian law or human rights law, there is no consensus among scholars, judges and other experts.⁴² We can establish that there are legal *lacunae* in respect of holding an armed opposition group directly responsible for international crimes because there are no mechanisms for determining its international criminal responsibility as a group.⁴³ However, there are mechanisms by which one can determine the responsibility of AOGs indirectly, whether through the individual responsibility of their members, or through the responsibility of a state, depending on whether it is possible to attribute the wrongful conduct of an armed group to a state.

With respect to the first of the abovementioned mechanisms, an individual is responsible for his own conduct. If he commits an international crime as a member of an armed opposition group, it usually implies a war crime (a breach of international humanitarian law), a crime against humanity, or genocide, for which he can be criminally prosecuted before national or international courts.⁴⁴ However, the group he is a member of and which, presumably, enabled or even encouraged the commission of such crimes, cannot be held criminally liable, at least not at the current stage of development of international criminal law.⁴⁵ One can only draw conclusions on the possible responsibility of the group itself on the basis of the criminal sentences handed to its individual members, but only under certain preconditions: that the crimes committed are on a massive scale; that members of the group benefit from the membership; that their acts are collectively pursued as part of the group's ideology

Establishment of an International Criminal Court, Working Paper on Article 23, 1998, para. 5. For a more detailed discussion on the proposed inclusion of legal persons under the Rome Statute see Van den Herik, 2012, pp. 1–26; Schabas, 1998, pp. 409–410. See also Schabas, 1998, p. 410.

40 Draft Articles on Prevention and Punishment of Crimes against Humanity, 2019, Article 6, para. 8.

41 According to Article IX of the Genocide Convention, the International Court of Justice has jurisdiction over disputes concerning, among others, the international responsibility of a state party for genocide and other acts enumerated in Article III of the Convention. Genocide Convention, Article IX.

42 ILA Report, 2014, p. 695.

43 During the drafting of the Rome Statute of the ICC there were proposals for the criminalisation of armed opposition groups and their inclusion in the Statute on the basis of the attribution of individual member's conduct to the group. However, this idea was eventually rejected, and the Statute retained the criminal responsibility of individuals only. Rome Statute, 1998, Article 25.

44 Under the Rome Statute, the ICC has jurisdiction with respect to the crime of genocide, crimes against humanity, war crimes and the crime of aggression. Rome Statute, 1998, Article 5.

45 ILA Report, 2014, p. 696.

or policy; that the group has an organised structure; and that the members are subject to military command.⁴⁶ Under these conditions, a collective organisational responsibility of AOGs in non-international armed conflicts can be construed and recognised. If a group somehow enables the commission of crimes, supports and/or encourages violations of international humanitarian law or human rights law, and if the crimes are committed with the aim of realising political or other goals of the group, then the rules of attribution of individual members' acts to the group itself might apply.⁴⁷

As regards the connection between the responsibility of a state and an armed opposition group, such a connection is usually evident in times of armed conflicts in situations where a state engages a private entity, a group, to achieve its goals by circumventing the use of its own state organs. This manoeuvre allows a state to circumvent the establishment of its direct international responsibility for potential violations of international law.⁴⁸ However, it turns out to be quite difficult in practice, in a judicial process, to satisfy the high threshold of attribution of the acts of armed groups to a state. According to the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, breaches of international law can be attributed to a state in several cases: first, if a group is empowered by the law of that state to exercise elements of governmental authority; second, if a group is acting under the instructions, direction, or control of that state; and third, if that state acknowledges or adopts the conduct of a group as its own.⁴⁹ Since it is rare in practice for a state to overtly use such groups for its purposes, the link between a state and an armed group usually stays hidden, so the rules of attribution of their acts to a state rarely apply. Even if they are applied by a court, it is almost impossible to prove a sufficiently strong and indisputable connection between a state and a group to satisfy the attribution test. The application of the effective control test by the ICJ in such well-known cases as *Nicaragua v. United States of America* of 1986⁵⁰ and *Bosnia and Herzegovina v. Serbia and Montenegro* of 2007⁵¹ shows that to prove state control of military and paramilitary operations in the course of which the alleged violations of international law were committed⁵² is almost impossible. It is logical to conclude that states can relatively easily escape responsibility for the international wrongful acts

46 Ibid. p. 697.

47 The Draft Articles on the Responsibility of States provisionally adopted by the International Law Commission in 1996 envisaged the possibility of the attribution of conduct of the organ of the insurrectional movement to that movement 'in any case in which such attribution can be made under international law'. This provision was eventually deleted since, according to the Special Rapporteur, it concerned questions of the responsibility of insurrectional movements, which are, by definition, not states, thus falling outside the scope of the Draft Articles. ILC Report, 1996, p. 129.

48 ILC Draft Articles, 2001, Articles 2, 4–6.

49 Ibid., Articles 5, 8, 11.

50 ICJ Reports, 1986, para. 115.

51 ICJ Reports, 2007, paras. 396–413.

52 ICJ Reports, 1986, para. 115. For a more detailed analysis of the effective control test, see Boon, 2014, pp. 346 et seq; Milanović, 2006, pp. 577, 597–598; Talmon, 2009, pp. 502 et seq.

(and international crimes) of private persons and private groups who are formally outside the state apparatus, but who are engaged to act as instruments of the state. On the other hand, it is significant that in both of the cases mentioned, although limited by its *ratione personae* competence, the ICJ concluded: '[The Court] takes the view that the *contras* remain responsible for their acts (...)',⁵³ and that '(...) all the indications are...that the decision to kill the adult male population of the Muslim community in Srebrenica was taken by some members of the VRS Main Staff, but without the instruction from or effective control by the FRF'.⁵⁴

In our opinion, this reasoning by the Court actually opened the door for future discussions of the direct responsibility of NSAs for violations of international humanitarian law and genocide.⁵⁵ The analogy with the rules of attribution of a conduct to a state could serve for this purpose, at least in respect of AOGs characterised by a high level of organisation, with clear division of functions and a hierarchy between its members or its organs, as well as by the exercise of control of part of the state territory,⁵⁶ although this theory is not unequivocally accepted by scholars.⁵⁷ The inclusion of an additional mode of international responsibility, along with the responsibility of a state and that of an individual, could be seen as a positive development in international criminal law, in terms of creating a more complete regime of responsibility and serving the needs of international criminal justice.⁵⁸

5. Direct international criminal responsibility of non-state actors – continuing challenges

The above-described legal *lacuna* in regard to the existence of mechanisms for the determination of the direct international responsibility of NSAs has been provisionally settled in theory with the proposition that the responsibility of AOGs (insurrectional movements) is “transferred” either to the new government they establish (if they succeed in overthrowing the current government), or to the new state (if they succeed in establishing a new state on part of the territory of the pre-existing state).⁵⁹

53 ICJ Reports, 1986, para. 116.

54 ICJ Reports, 2007, para. 413. See also Bolani, 2003, pp. 414–415.

55 There are currently three cases involving the issue of state responsibility for genocide under deliberation before the ICJ: the case between The Gambia and Myanmar, the case between Ukraine and the Russian Federation, and the case between South Africa and Israel. International Court of Justice, <https://icj-cij.org/home> (Accessed: 13 January 2025).

56 Momtaz, 2010, p. 245. These territorially determined entities are recognised as having a limited and temporary international legal personality. See more in Lapaš, 2010, p. 105.

57 Sassòli, 2010, pp. 47 et seq.

58 On the differences and complementarity of the two regimes of responsibility (of states and of individuals), see Bianchi, 2009, pp. 16–24.

59 ILC Draft Articles, 2001, Article 11, paras. 1 and 2. The ILC explains that the general principle is

If, on the other hand, a movement fails in its endeavours, its responsibility cannot be established since the movement ceases to exist as an autonomous entity.⁶⁰ Moreover, it would be almost impossible in practice to successfully prosecute a claim against an armed opposition group after its defeat.⁶¹

However, an increasing number of scholars take into account the reality of contemporary non-international armed conflicts in which NSAs participate, often fighting among themselves, without the involvement of the government, in conflicts that last for a long time and in which many violations of international law occur to the detriment of civilians and material property. In this context, these scholars address the need for the recognition of the direct international (criminal) responsibility of AOGs as collectives in non-international armed conflicts.⁶² There is a consensus among them that the only (or the most significant) requirement in this regard is the effectiveness of their territorial control, and not the recognition of their formal status.⁶³

The need to criminalise NSAs as groups was highlighted during the diplomatic conference for the preparation of the Rome Statute of the ICC. One of the drafts of the future Statute envisaged the jurisdiction of the Court over physical and legal persons; however, it did not specify the definition of the legal persons that this provision would encompass.⁶⁴ The idea was ultimately abandoned due to strong advocacy by some participants that the inclusion of the criminal responsibility of NSAs might endanger the realisation of the right of peoples to self-determination.⁶⁵ On the other hand, the omission of the criminal responsibility of NSAs from the Rome Statute could also be explained by practical reasons. Namely, not all states envisage the criminal responsibility of legal persons in their criminal codes; hence, the inclusion of such a provision in the Rome Statute would create an asymmetric situation because the principle of complementarity would only be applicable in those states which prescribe such a mode of responsibility.⁶⁶ However, some progress has been made in regard to the inclusion of legal persons' liability for crimes against humanity on the international level, in the International Law Commission's Draft Articles on Prevention and Punishment of Crimes against Humanity in Article 6, para. 8.⁶⁷ Fur-

that in respect of the actions of such movements, committed during the continuing struggle with the constituted authority, they are not attributable to the state under international law. In other words, the acts of unsuccessful insurrectional movements are not attributable to the state, unless some other articles of the Draft are applicable. ILC Draft Articles, 2001, p. 50.

60 ILA Report, 2014, p. 696.

61 Dumberry, 2022, pp. 204–207.

62 Zegveld, 2002, pp. 133 et seq; Lapaš, 2015, pp. 343–351; Crawford, 2013, p. 180; Ryngaert and Noortmann, 2010, pp. 5–14; Dumberry, 2022, pp. 200–209.

63 Dumberry, 2022, pp. 203–204.

64 Article 23, para. 5 of the 1998 draft prescribed: 'The Court shall also have jurisdiction over legal persons, with the exception of States, when the crimes committed were committed on behalf of such legal persons or by their agencies or representatives'. Report of the Preparatory Committee on the Establishment of an International Criminal Court, 1998, pp. 48–49.

65 Zegveld, 2002, pp. 57–58.

66 Schabas, 2006, p. 139; Saland, 1999, p. 199.

67 See *supra*, note 40.

thermore, the increasingly frequent inclusion of the concept of the criminal liability of legal persons in the criminal legislation of European states might accelerate discussions among scholars and practitioners concerning the adoption of such a concept in the Rome Statute in the future. However, the jurisdiction of the ICC, encompassing only the most serious international crimes, which are, due to their specific elements, usually attributable only to individuals, is a limiting factor in this regard.⁶⁸

Nevertheless, it is evident that international criminal law is constantly developing and adapting to the reality of international relations and contemporary challenges involving NSAs in armed conflicts. We can identify certain rules of international criminal law that are also applicable to NSAs, including AOGs, which most frequently commit massive international crimes, often as part of a widespread or systematic attack against civilians and pursuant to some plan or policy, or the realisation of an ideology or some criminal agenda. The provisions of some international conventions on the criminal responsibility of legal persons also contribute to the acceptance of such a mode of responsibility. We see such solutions as a manifestation of the progressive development of international criminal law, which, in the future, could also be extended to the responsibility of AOGs.⁶⁹ Furthermore, the jurisprudence of international courts and tribunals, particularly the ICC, although they are limited in terms of their *ratione personae* jurisdiction, also leads to the conclusion that the international criminal responsibility of AOGs exists,⁷⁰ particularly in relation to the activities of such groups in situations of non-international armed conflicts. Further factors that are determined in judicial proceedings, from which the existence of the criminal responsibility of a group can be inferred, are the following: the crimes are committed within the realisation of the criminal purpose of the group, the organisational structure of the group provides support to the members and finances their activities, and it enables the actions of its members on the basis

68 Wattad, 2016, pp. 421–422.

69 See, for example, International Convention on the Suppression and Punishment of the Crime of Apartheid, 1973, Article 1, para. 2; International Convention for the Suppression of the Financing of Terrorism, 1999, Article 5; Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, 2000, Article 3, para. 4; Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, 2014, Article 46C. On the criminalisation of illegal acts of legal persons in various national legal systems, see Clapham, 2009, pp. 899 et seq.

70 For example, in the Judgment in the case *The Prosecutor v. Dominic Ongwen* of 2021, the ICC describes in detail the establishment, hierarchical structure and activities of the LRA (Lord's Resistance Army) in Uganda between 2002 and 2004, which, as a strategy for the realisation of its goal to violently overthrow the government, committed widespread and systematic attacks against civilians, abductions of civilians, sexual assaults and other crimes. See also, ICC, 2012; ICC, 2014; SCSL, 2007. We also refer readers to the judgement rendered by the Special Tribunal for Lebanon of 2016, in which the Tribunal decided on the existence of criminal liability of a corporation as a legal entity, which indicates the direction of the development of international criminal law; international hybrid courts may also have jurisdiction in regard to the international criminal responsibility of legal persons. See STL-14-06/T/CJ, 2016.

of the group's policy or plan, thus enabling the acts to be committed, usually, in a systematic way.

To recapitulate, the explanations of the ICC in regard to the structure of a group, its hierarchical composition and military discipline, the existence of a certain plan or policy, and particularly if the *modus operandi* of the group includes systematic violations of international humanitarian and human rights law, lead to the conclusion that the crimes committed do not necessarily involve only the issue of criminal responsibility of individual members of a group, as direct perpetrators of the crimes, but also that the group, by providing the structure, the means and the goal of the group's activities, is directly responsible under international law for the crimes committed.⁷¹

The current lack of efficient institutional mechanisms on the international level to determine the direct international criminal responsibility of AOGs for international crimes does not mean such a responsibility does not exist, or that the theoretical and policy solutions *de lege ferenda* will not facilitate the holding accountable of these entities for violations of international humanitarian law, human rights law and international criminal law. It is no longer contested that they are bearers of these international obligations, and that they, therefore, have a limited international legal personality.⁷² It is also undisputable that they are capable of violating these obligations, from which their international responsibility derives. In this author's opinion, if the obligatory nature of these norms towards AOGs, as well as the issue of their direct international criminal responsibility, depended on the enforcement mechanisms only on the international level, the possibility to influence their behaviour in armed conflicts would be lost, and the most vulnerable victims of armed conflicts, the civilians, would remain without any legal and real protection.

6. Conclusion

The international legal framework applicable to AOGs, as we have seen, is not always clear and unambiguous, hence the issue of their direct international responsibility for international crimes remains an on-going challenge for the theory of international public and international criminal law. The vagueness of certain rules, particularly in regard to the specificity of armed groups subject to international humanitarian law or the preconditions necessary for the application of human rights law, in combination with the lack of legal institutional mechanisms for holding NSAs

71 However, we agree with authors who, although admitting that NSAs (insurrectional movements) can bear direct international responsibility, say that their responsibility is more easily obtained through other means, particularly by determining the individual responsibility of their members. Cahin, 2010, pp. 253–254.

72 Similarly, Clapham, 2009, pp. 924–926.

accountable for violations of these norms, creates a legal *lacuna* in relation to the establishment of the direct international responsibility of these international subjects, particularly in cases where the standards required for attribution of their acts to a state are almost impossible to overcome. We consider this especially worrying in situations of the most serious international crimes against civilians, such as genocide or crimes against humanity.

However, the reality of international relations and the emergence of many different actors whose activities undoubtedly affect the dynamics of the relations between states and non-state actors, and unfortunately, endanger the lives of innocent civilians, advocate taking a step forward in recognising the direct international responsibility of AOGs. The decisions of international courts and tribunals, in which it is determined that certain crimes, although committed by individuals as members of AOGs, are committed within the structured and organised group, which supported, enabled and/or financed their activities, which are furthermore perpetrated as part of a plan or policy of the group, according to a certain pattern and on a massive scale, and whose members benefit from membership in the group, are very helpful in drawing the conclusion that these groups are, as collectives, internationally responsible for the commission of these crimes. These conclusions are supported by many Security Council resolutions directly targeting AOGs, and by decisions made by other relevant UN bodies, in which NSAs are called upon to end violations of international law and adjust their behaviour in line with their international obligations.

The *ratio* for the criminalisation of NSAs for the most serious and massive international crimes is to safeguard elementary principles of humanity, which should be respected in armed conflicts in order to minimise the tragedy of the loss of innocent lives and the suffering of civilians. International criminal justice cannot be fully satisfied if one searches only for individual criminal responsibility. The variety of armed conflicts and of actors who are obliged to act in accordance with international law, along with the enormous extent and gravity of the crimes committed, call for recognition of the international criminal responsibility of NSAs as groups. Hence, in order to complement the international criminal justice framework, it is necessary, first, to reach a consensus in terms of defining specific features of NSAs that makes them capable of violating the international legal rules constituting international crimes; to use the jurisprudence of the ICC and other international courts and organs to explain the role of NSAs in the international criminal law framework and to define the legal basis for their international responsibility, as well as the prerequisites for attribution of the acts of individual members of NSAs to the group itself; to consider discussing amendments to the Rome Statute regarding the inclusion of AOGs within the jurisdiction of the ICC; to establish another suitable international forum to determine their international responsibility; to engage national and international mechanisms to put pressure on NSAs to ensure reparation for victims; and to encourage AOGs to commit themselves to respect international humanitarian and human rights law by unilateral statements or agreements.

A comprehensive theoretical, institutional and organisational approach by various actors participating in the development, interpretation and application of international criminal law is thus required in order to achieve a greater level of legal certainty and to establish the responsibility of all those who commit the most serious international crimes against civilians. The potential preventive effect of such a line of action should also not be underestimated.

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THE INTERNATIONAL CRIMINAL COURT AND AFRICA: A LEGAL ALTERNATIVE TO IMPLEMENTING INTERNATIONAL CRIMINAL JUSTICE



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Abstract

The International Criminal Court (ICC) has been criticised for its perceived focus on Africa in addressing war crimes, genocide, and crimes against humanity. This chapter contends that ensuring justice for victims in Africa is crucial, necessitating a complementary relationship between the ICC and regional justice bodies. The chapter examines the regional initiatives established by the African Union and its Member States to provide a legal alternative, supplementing the ICC's efforts. By prosecuting individuals accused of international crimes in regional, national, or hybrid tribunals, such as the African Extraordinary Chambers in Senegal, these initiatives aim to deliver justice to victims while addressing concerns of bias. This paper advocates for a collaborative approach between the ICC and regional mechanisms to combat impunity and promote accountability for grave human rights violations.

Keywords: International Criminal Justice, International Crimes, International Criminal Court, Rome Statute, African Union, African Regional Tribunals

1. Introduction

The relationship between the International Criminal Court (ICC) and Africa has been complex and multifaceted since the ICC's establishment in 2002, with African countries representing the largest bloc.¹ While the ICC was created with the aim of promoting justice and accountability for the most serious international crimes, including genocide, war crimes, and crimes against humanity, its interactions with African countries have been a subject of both praise and criticism.² Currently, out of the 124 countries that are States Parties to the Rome Statute of the ICC, 33 are African States.³ There were 34 African States; however, Burundi withdrew from the ICC on 27 October 2017. About 30 cases before the ICC involved individuals from African countries such as the Central African Republic (CAR), Ivory Coast, Sudan, the Democratic Republic of Congo, Kenya, Libya, Mali, and Uganda, prompting many authors to recognise the complexity of the ICC-African relationship.⁴

2. Why is international justice needed in Africa?

To answer why international justice is needed in Africa, one should consider the horrific events that have unfolded across the continent in recent decades – from the Rwandan Genocide to the brutal civil wars in Liberia and Sierra Leone – which have laid bare the desperate need for international justice mechanisms. These tragedies, which claimed millions of lives and displaced countless others, stand as stark reminders of the devastating consequences of impunity. Therefore, the ICC can be seen as the international community's answer to hold perpetrators accountable for these atrocities, fostering peace and preventing future crimes.

The Rwandan Genocide of 1994, for instance, brought the international community together in shock and horror as nearly 800,000 people were slaughtered in a campaign of ethnic cleansing within just 100 days. The sheer scale and brutality of this event demanded a global response, emphasising the need for accountability to prevent such crimes from being repeated elsewhere. Although the ICC was not established then, it represents the international community's commitment to ensuring such acts never go unpunished.

Similarly, the devastating Congo Wars, the Sudanese Civil Wars – including the horrific events in Darfur – and the numerous civil wars in Liberia and Sierra Leone have left deep scars on the continent. These conflicts were often characterised by

1 Jalloh, 2010, pp. 395–460.

2 Whitely & Ivanov, 2020.

3 International Criminal Court. (n.d.). The States Parties to the Rome Statute.

4 Rowe, 2021, pp. 51–61.

war crimes and crimes against humanity, with civilians bearing the brunt of the violence. In the absence of a response by a regional justice body to prosecute those responsible for these atrocious acts, the ICC can be viewed as a necessity to hold criminals accountable and offer justice to all while the regional justice bodies are developing and improving. The ICC offers a crucial tool for holding those responsible accountable, deterring future atrocities, and fostering reconciliation within these fractured societies.

Article 13 of the Rome Statute grants the Court the authority to investigate and prosecute crimes committed worldwide, subject to its jurisdiction, or upon request by the United Nations Security Council (UNSC), thereby conferring the Court's universal jurisdiction. The ICC's focus on Africa in its early years reflects the urgent need for justice following these devastating conflicts. Furthermore, African nations themselves have been active participants in the ICC, with several countries referring cases, thus showcasing their support for the Court.⁵ This demonstrates African States' recognition of the importance of international justice in addressing these complex issues. For instance, Uganda became the first nation to refer a case to the ICC in 2004, requesting an investigation into the Lord's Resistance Army (LRA) and its leader, Joseph Kony, for war crimes and crimes against humanity. Similarly, the CAR referred a case to the ICC in 2004 regarding ongoing violence within the country. During the 2012-2013 civil unrest, Mali requested an investigation into crimes committed on its territory.

In this framework, it can be understood that international justice mechanisms offered by the presence of the ICC are a crucial step towards a more just and peaceful world. By holding perpetrators accountable for the horrific crimes that have plagued Africa, the ICC can help break cycles of violence, promote reconciliation, and deter future atrocities.⁶ The ICC intervenes in situations where a State is unable or unwilling to genuinely conduct investigations and prosecute perpetrators of the most serious crimes. In many cases, particularly in Africa, the lack of adequate justice infrastructure, funds, and expertise poses significant challenges to national authorities in effectively addressing these crimes. Countries that have experienced devastating civil wars or are undergoing reconstruction often struggle to establish functioning judicial systems capable of handling complex international crimes. As a result, the ICC's focus on Africa can be analysed as a response to the prevalent impunity and the need for international assistance in addressing impunity and accountability.

⁵ García Iommi, 2023, pp. 16–30.

⁶ Shilaho, 2023.

3. How can joining the ICC benefit countries?

African countries can decide to join the ICC for many reasons, all aiming to strengthen accountability and combat impunity for the most serious international crimes. The ICC serves as a crucial partner in this endeavour. First, by joining the ICC, African States actively participate in the international fight against impunity. This aligns with the Rome Statute of the ICC, the founding treaty of the ICC, which establishes the Court's jurisdiction over these core international crimes. The term "jurisdiction" in the context of international criminal law is often contentious, with its interpretation varying across legal systems globally.⁷ Nonetheless, it is essential to underscore that ratification and adherence to the Rome Treaty signify a dedication to upholding international legal norms and seeking redress for victims. Second, the ICC offers vital resources to bolster domestic legal systems. African countries joining the ICC gain access to technical assistance and expertise. This strengthens their capacity to investigate and prosecute complex international crimes, potentially fulfilling their obligations under conventions such as the Geneva Conventions, which outline the treatment of civilians and prisoners of war during armed conflict. Moreover, joining the ICC provides African nations with a platform to address issues of impunity within their borders. The ICC's mandate to hold individuals accountable for serious international crimes, such as genocide, war crimes, and crimes against humanity, aligns with the goals of many African States to promote accountability and ensure justice for victims. Membership in the ICC also serves as a deterrent to potential perpetrators of such crimes, sending a clear message that there will be consequences for their actions. One significant aspect of the ICC is its principle of complementarity, which allows States to take the lead in prosecuting international crimes within their own jurisdictions. This principle ensures that the ICC intervenes only when national authorities are unwilling or unable to prosecute such crimes themselves, thus respecting the sovereignty of Member States while reinforcing the rule of law at the international level. African countries' participation in the ICC reflects a multifaceted approach to achieving justice. It fosters international cooperation, strengthens domestic legal systems, deters future crimes, and promotes accountability for the most severe international offences.

However, while the Court has made strides in promoting accountability and deterring future crimes, it must address criticisms of bias and work collaboratively with African nations to strengthen its legitimacy. The ICC's success in Africa will depend on its ability to adapt, engage with local contexts, and ensure that justice is served impartially and effectively in Africa, Latin America, Asia, or the Middle East.

⁷ Tatarinov, 2021.

4. The goals and objectives guiding ICC actions in Africa

4.1. Prosecutions and Accountability

Various articles (1, 5, 17, 27, 53.) of the Rome Statute, the treaty that established the ICC, highlight the importance of the mission of promoting accountability and ensuring justice for victims of the most serious international crimes. As a global justice mechanism, the ICC targets people, leaders of armed groups, or political leaders responsible for crimes committed during periods of State incapacity, such as civil wars and conflicts. By prosecuting individuals who bear the greatest responsibility for these crimes, it seeks to provide a measure of justice to the victims and deter future atrocities, contributing to the prevention of such crimes and promoting accountability and the rule of law in Africa and beyond.

4.2. Deterrence and Prevention

Highlighted in Articles 1, 5, 17, 27, 53, and 56, these objectives have arguably helped deter future crimes. The threat of prosecution by an international court has influenced some leaders to reconsider their actions and may have prevented further escalation of conflicts in certain regions.

4.3. Recognition of Victims

Articles 68, 68(3), 75, and 79 enable the ICC to provide a platform for victims to share their stories and seek justice. The Court's acknowledgement of their suffering has given a voice to those who have long been marginalised and ignored, with opportunities to participate in proceedings and receive reparations. While reparations are not considered a standalone principle, they are an integral component of the ICC's mandate to address the needs of victims and provide redress for the harm they have suffered as a result of international crimes. Articles 75 and 79 of the Rome Statute outline this topic, and based on that, the ICC judges have recently assessed the reparations cost in the Ongwen case at €52,429,000. This comprehensive amount comprises €15 million designated for collective community-based reparations, €37,329,000 allocated for individual symbolic awards of €750 to victims, and an additional €100,000 earmarked for various community, symbolic, and satisfaction measures, including acts of apology and monuments. Given Ongwen's indigence and inability to contribute to reparations, the significant number of victims in this case presents a formidable challenge for the Trust Fund for Victims (TFV). The necessity for extensive fundraising efforts involving collaboration with States, organisations, companies, and individuals to meet this unprecedented demand is important to help implement the principle of recognising victims and effective reparations.

4.4. Partnership and Outreach

While not designated as standalone principles, the ICC recognises the importance of cooperation and collaboration with various stakeholders, including States, regional organisations, civil society, and affected communities, to effectively carry out its mandate. Strengthening partnerships with these entities allows the ICC to enhance its credibility, address concerns about bias, and ensure that justice is served while respecting local contexts.

Article 87(1): outlines the cooperation and assistance that States Parties are required to provide to the ICC to investigate and prosecute crimes within its jurisdiction. This cooperation framework can facilitate the strengthening of partnerships with African countries and regional organisations.

Article 87(5) emphasises the importance of cooperation agreements among the ICC, the States Parties, and other international organisations to facilitate effective collaboration and support for the Court's work.

4.5. Enhancing Outreach

Article 87(7) encourages the ICC to engage in outreach activities to promote the understanding of its mandate, functions, and activities among the public, particularly in countries where investigations or trials occur. This includes efforts to engage with communities affected by the crimes under the ICC's jurisdiction.

Article 68(3): While not directly related to outreach, this article affirms the rights of victims to participate in ICC proceedings and have their views and concerns considered. Effective outreach efforts can ensure that victims are informed about their rights and the role of the ICC in addressing their grievances.

5. Selected cases of African nationals before the ICC

The “African” cases brought before the ICC reveal its commitment to justice for victims regardless of nationality and the social status of the perpetrators. The cases of African nationals before the ICC highlight the Court's pursuit of accountability and its potential to support regional justice initiatives, a topic we will widely develop in the following paragraphs.

5.1. The Prosecutor v. Dominic Ongwen (Uganda)

In 2004, Uganda became the first country to refer a case to the ICC, requesting an investigation into the LRA led by Joseph Kony. The LRA was accused of widespread atrocities against civilians in Uganda and neighbouring countries. While

Kony remains at large, arrest warrants issued against several LRA commanders, such as Okot Odhiambo (killed in 2005) and Vincent Otti (died in 2008), were not successfully executed.

Dominic Ongwen, a former child soldier who ascended the ranks within the LRA, made history as the first LRA commander to face trial at the ICC. Charged with 61 counts of crimes against humanity and war crimes allegedly perpetrated after 1 July 2002, in northern Uganda, Ongwen's trial concluded with the Trial Chamber IX sentencing him to 25 years of imprisonment on 6 May 2021. Subsequently, on 15 December 2022, the appeals chamber upheld the decisions of Trial Chamber IX regarding Ongwen's guilt and sentence. Finally, on 18 December 2023, Ongwen was transferred to Norway to serve his prison sentence, and his conviction and sentence are now deemed final, marking a significant milestone in the pursuit of justice for crimes committed in Uganda in the context of the LRA insurgency.

5.2. The Prosecutor v. Thomas Lubanga Dyllo (The Democratic Republic of Congo)

The Democratic Republic of Congo (DRC) referred to two situations in the ICC. The first involved crimes committed by various armed groups during brutal civil and international conflicts. The second focused on violence in the Ituri province. The ICC has secured convictions for war crimes and crimes against humanity, including the use of child soldiers against Thomas Lubanga Dyllo, charged under the Rome Statute with war crimes, specifically for conscripting and enlisting children under the age of 15 into armed groups and using them to participate actively in hostilities. Additional Protocols to the Geneva Conventions⁸ stipulate that the recruitment and use of child soldiers constitute violations of international humanitarian law (Article 77 of Additional Protocol I of the Geneva Conventions and Article 4(3)(c) of Additional Protocol II).

The case's impact extends beyond the specific circumstances of the DRC, a country that has been through multiple wars and whose children have seen their universal rights infringed countless times due to political instabilities. The case has shaped international norms and standards for protecting children in armed conflicts. Efforts to prevent the use of child soldiers, rehabilitate former child soldiers, and prosecute those responsible have gained momentum in various regions, partially due to the precedents set by cases like Lubanga's. On 14 March 2012, he was convicted of committing, as co-perpetrator, war crimes consisting of enlisting and conscripting children under the age of 15 years into the Force Patriotique pour la libération du Congo [Patriotic Force for the Liberation of Congo] (FPLC) and using them to participate actively in armed conflicts (punishable under Article 8(2)(e)(vii) of the Rome Statute).

8 International Committee of the Red Cross. (n.d.). International humanitarian law databases.

5.3. The Prosecutor v. Bosco Ntaganda (The Democratic Republic of Congo)

The background of the case revolves around criminal activities in the Ituri region of the DRC between 2002 and 2003. Similarly, in the case of Prosecutor v. Bosco Ntaganda, a Congolese rebel commander was charged with numerous counts of war crimes and crimes against humanity, including murder, rape, and the use of child soldiers, committed in the Ituri and North Kivu regions of the DRC. Ntaganda was eventually found guilty and sentenced to 30 years in prison by the ICC. These cases demonstrate the ICC's commitment to prosecuting individuals responsible for grave crimes, regardless of their status or position. However, it also highlights the need for African leaders to invest in regional justice systems to ensure that justice is served effectively and efficiently locally.

5.4. The Prosecutor v. Ahmed al-Faqi al-Mahdi (Mali)

Mali referred to the ICC concerning crimes committed during the 2012-2013 conflict. This case demonstrates the willingness of States to utilise the ICC to address war crimes, even during internal conflicts. Ahmed al-Faqi al-Mahdi, a Malian Islamist, was charged with the war crime of intentionally directing attacks against historic monuments and buildings dedicated to religion in Timbuktu, Mali, during the occupation by extremist groups in 2012. He pleaded guilty and was sentenced to nine years in prison.

5.5. The Prosecutor v. Laurent Gbagbo & Charles Blé Goudé (Côte d'Ivoire)

Following the 2010-2011 post-presidential election violence, the ICC opened an investigation into crimes committed by both sides of the conflict. This case underscores the ICC's impartiality in pursuing accountability regardless of political affiliations and social status, as Mr Laurent Gbagbo was the former president of Côte d'Ivoire and was competing for a new mandate. He was charged with crimes against humanity, including murder, rape, and persecution, committed during the post-election violence in 2010-2011. However, he and youth leader Charles Blé Goudé were acquitted of all charges and released from detention, showcasing international justice's impartiality.

5.6. The Prosecutor v. Uhuru Kenyatta (Kenya)

Following the 2007 presidential election violence, the ICC investigated allegations of crimes against humanity against Kenyan political figures. This case highlights the challenges the ICC faces in securing cooperation from national governments. Uhuru Kenyatta, the president of Kenya, was charged with crimes against humanity for his alleged role in the violence following the 2007 Kenyan elections, which resulted in the deaths of over 1,000 people and the displacement of hundreds

of thousands of others. However, the case against Kenyatta was terminated due to insufficient evidence and a lack of cooperation from the Kenyan government.

A similar case regarding a former political leader is that of Omar al-Bashir, the former president of Sudan. The ICC issued arrest warrants for Sudanese government officials, including Omar al-Bashir, for alleged crimes against humanity and genocide in Darfur. However, al-Bashir evaded arrest and extradition despite the indictments, ultimately escaping trial before the ICC due to the lack of State cooperation.⁹ This situation underscores the limitations of international justice mechanisms and highlights the necessity for strong and effective regional justice systems capable of holding perpetrators accountable within their own jurisdictions.

Overall, the collaboration between the ICC and regional African justice systems is indispensable for advancing and fortifying the latter. By partnering with the ICC, African nations have the opportunity to bolster their capacity to investigate, prosecute, and adjudicate cases involving severe international crimes. This collaborative endeavour expedites the dispensation of justice and fosters the region's rule of law and accountability. Furthermore, it allows African countries to enhance their knowledge and expertise in navigating intricate legal matters, thereby being pivotal in establishing a robust regional African justice system. The assertion of bias towards the ICC diminishes when regional justice systems engage in cooperative efforts with the ICC, underscoring the vital and imperative nature of such collaboration. While the ICC undeniably fulfils a crucial role in prosecuting serious international crimes, it is incumbent upon African leaders to prioritise the development of resilient regional justice mechanisms. These mechanisms complement the ICC's efforts and ensure accountability and justice for all, ultimately strengthening the fabric of the rule of law across Africa and the world.

6. Examples of the implementation of regional African justice systems to fight impunity

Since the second half of the 20th century, various measures have been taken on the African continent to combat international crimes and other serious violations of international law. When the idea of establishing a regional African system for the protection of human rights was being discussed, proposals were made for establishing mechanisms to hold persons accountable for committing international crimes. Among these mechanisms, this paper highlights three initiatives:

1. The African Extraordinary Chambers – established in 2013 in Senegal.

9 Sakarombe, 2023, pp. 7–19.

2. The Special Court for the CAR (SCCAR) – established in 2015 to prosecute those responsible for international crimes in the CAR since 1 January 2003.¹⁰

3. The Special Court for Sierra Leone (SCSL) – created on the basis of an agreement concluded between the UN and the government of Sierra Leone.

6.1. The African Extraordinary Chambers

Chronologically, it seems appropriate to first consider the African Extraordinary Chambers for Chad (EAC), which were created as part of the judicial system of the Republic of Senegal as a result of an agreement concluded between the African Union (AU) and Senegal to prosecute those most responsible for international crimes and other serious violations of international law committed on the territory of the Republic of Chad from 7 June 1982, to 1 December 1990.¹¹ The main suspect convicted by the EAC was the former president of the Republic of Chad, Hissène Habré, who was accused of committing large-scale and serious international crimes in his country.¹² In this case, for the first time, a former president of an African State was prosecuted by another African State based on universal jurisdiction, and for the first time, the AU was involved in establishing an internationalised criminal tribunal in the African continent.¹³

Hissène Habré ruled the Republic of Chad from 1982 to 1990. Serious human rights violations were allegedly committed under his regime.¹⁴ After he was overthrown by Idriss Debi Itno in 1990 in a coup d'état, Senegal granted Hissène Habré asylum in December 1990. Two years later, a Commission of Inquiry, established under the auspices of the Chadian Ministry of Justice, concluded that more than 40,000 political assassinations and systematic torture had been committed under the rule of Hissène Habré.¹⁵

On 25 January 2000, some citizens of Chad filed an application in the Senegalese courts against Hissène Habré¹⁶ for violation of the UN Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment. Hissène Habré was indicted in February 2000 by the District Court of Dakar (Senegal) for complicity in the commission of crimes against humanity, particularly torture.¹⁷ Thereafter, Hissène Habré filed a motion to challenge the indictment before the Dakar

10 République Centrafricaine. (2015). Loi organique n° 15-003 portant création, organisation et fonctionnement de la Cour pénale spéciale.

11 Union africaine et Gouvernement de la République du Sénégal. (August 2012). Accord entre le Gouvernement de la République du Sénégal et l'Union Africaine sur la création des Chambres africaines extraordinaires au sein des juridictions senegalaises.

12 Cimiotta, 2015, pp. 177–197.

13 Williams, 2013, pp. 113–1160.

14 Marusin, 2019, p. 691.

15 Human Rights Watch. (2005, July).

16 Cour d'appel de Dakar. Procès - verbal d'interrogatoire de première comparution. 13/2000.

17 Cour d'appel de Dakar. Procès - verbal d'interrogatoire de première comparution. 13/2000.

Court of Appeal on 18 February 2000 on the grounds that the Senegalese courts are incompetent to prosecute crimes committed on the territory of another State.¹⁸

On 4 July 2000, the Dakar Court of Appeal, following the petition by Hissène Habré, decided to overturn the indictment and immediately suspend the proceedings against him due to the lack of court's jurisdiction, stating that the Senegalese courts cannot hear cases of torture committed by a foreign citizen outside the territory of Senegal, regardless of the citizenship of the victims, considering that Article 669 of the then Senegalese Code of Criminal Procedure at the time excluded this jurisdiction.¹⁹ The decision of the Dakar Court of Appeal was appealed but was upheld on 20 March 2001 by Senegal's Court of Cassation, which indicated that the Senegal Code of Criminal Procedure does not recognise that the courts have universal jurisdiction to prosecute foreign nationals living for committing or complicity in the commission of torture if these acts were committed outside Senegal and that the fact that Hissène Habré was in Senegal could not by itself serve a basis for criminal proceedings against him for his alleged commission of crimes in a foreign country.²⁰

As a result, on 18 April 2001, the applicants (citizens of Chad), whose complaints remained unaddressed within the courts of Senegal, filed a complaint with the UN Committee against Torture under Articles 5(2) and 7 of the Convention against Torture.²¹ In addition, in November 2000, 21 Chadians residing in Belgium complained about Hissène Habré at the District Court of Brussels²² under Belgium's universal jurisdiction law for crimes against humanity, torture, arbitrary arrests, and abduction.

Accordingly, from February to March 2002, a Belgian Commission of Inquiry carried out an investigation in Chad, and after the waiver of the Hissène Habré immunity by the Chadian government, the Belgian investigative judge Fransen issued an international arrest warrant against Hissène Habré for alleged commission of crimes against humanity, war crimes, torture, and serious violations of international humanitarian law, and sent to Senegal a request for his extradition on 19 September 2005.²³ The Senegalese authorities subsequently arrested Hissène Habré on 15 November 2005; however, the Dakar Court of Appeal reiterated its incompetence to grant the extradition request of the former head of a foreign State, claiming that Hissène Habré enjoyed immunity from foreign criminal jurisdiction. Following this 2005 decision, a communiqué from the Senegalese Foreign Ministry was issued, which noted that the AU summit could decide which court is competent to hear the case.²⁴

18 Chambre d'accusation de la Cour d'appel de Dakar, Senegal, Ministère Public et Francois Diouf contre Hissene Habre (2000.) (Arrêt no 135).

19 Spiga, 2011, p. 18.

20 Cour de Cassation, Sénégal (2001). (Arrêt no 14). Souleymane Guengueng et Autres Contre Hissène Habre.

21 Suleymane Guengueng et al. v Senegal, Committee Against Torture, Communication No. 181/2001. (2001).

22 Brody, 2015, p. 211.

23 Spiga, 2011, p. 6.

24 Ministère des Affaires étrangères du Sénégal. (2005). Communiqué.

On 19 May 2006, the UN Committee against Torture, in response to a complaint lodged by the citizens of Chad, decided that Senegal had failed to fulfil its obligations under the Convention against Torture and that it should take the necessary measures, including establishing its jurisdiction over the crimes²⁵ allegedly committed by Hissène Habré. The Committee stated that Senegal was under obligation, in accordance with Article 7 of the Convention against Torture, to refer the case to its competent authorities for criminal proceedings or, otherwise, extradite Hissène Habré at the request of Belgium or to another State in accordance with the provisions of the Convention.²⁶

In this regard, on 24 January 2006, the Assembly of Heads of State and Government of the AU decided to establish a Committee of Eminent African Jurists, which was tasked with examining all aspects and consequences of prosecuting Hissène Habré case, as well as the available options for bringing him to justice in accordance with international fair trial standards while giving priority to African justice mechanisms, and make specific recommendations on ways and means to address such issues in the future.²⁷

The Committee of Eminent African Jurists (the Jurists' Committee) concluded, *inter alia*, that since Hissène Habré was located in Senegal, Senegal should have exercised its jurisdiction over the case. As a State party to the Convention against Torture, the Jurists' Committee indicated that Senegal is bound by its provisions. Consequently, the Jurists' Committee noted that, per its international obligations, Senegal should adopt the necessary amendments to its legislation and prosecute Hissène Habré.²⁸ Based on these recommendations, the AU Assembly of Heads of State and Government, on 2 July 2006, noted that 'the crimes of which Hissène Habré [was] accused fall within the competence of the African Union' and formally mandated 'the Republic of Senegal to prosecute and ensure that Hissène Habré is tried, on behalf of Africa, by a competent Senegalese court with guarantees for fair trial'.²⁹

At the same time, the AU Assembly of Heads of State and Government mandated the Chairperson of the AU, in consultation with the Chairman of the African Commission, to provide any necessary assistance to Senegal to ensure that the process is fair.³⁰

25 Decision of the Committee against torture under Article 22, Paragraph 7, of the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment Concerning Communication No. 181/2001. 17 May 2006.

26 Committee against Torture. (2006). Decision under Article 22, Paragraph 7, of the Convention against torture and other cruel, inhuman, or degrading treatment or punishment concerning Communication No. 181/2001.

27 African Union. (2006). Decision on the Hissène Habré Case (Doc.Assembly/AU/8 (VI)) Add.9.

28 Committee of Eminent African Jurists. (2005). Report on the Case of Hissene Habre.

29 African Union. (n.d.). Assembly/AU/Dec.127 (VII) Decision on the Hissène Habré Case and the African Union.

30 Ibidem.

Senegal has undertaken several legislative reforms to establish the necessary legal instruments to exercise jurisdiction over Hissène Habré. Thus, on 12 February 2007, Law No. 2007-02 amending the Criminal Code of Senegal was adopted, which significantly expanded the jurisdiction of the Senegalese courts to include war crimes, crimes against humanity, and crimes of genocide,³¹ and Law No. 2007-05 amending the Code of Criminal Procedure, which, *inter alia*, provides for the jurisdiction of the Senegalese courts in relation to a foreign national who is accused of committing crime outside the territory of Senegal or complicity in the commission of war crimes, crimes against humanity and genocide, if he is located in Senegal, the victim lives in the Republic of Senegal, or the government receives a positive response to extradite him to Senegal.³² These two laws were reflected in the 2008 amendment to Article 29 of the Constitution of Senegal, according to which the principle of non-retroactivity of criminal law in accordance with international law does not apply to genocide, crimes against humanity, and war crimes.³³

Subsequently, Hissène Habré filed a complaint with the Court of the Economic Community of West African States (ECOWAS) on 1 October 2008,³⁴ in which he argued that the adopted amendments to Senegalese legislation regarding the granting of jurisdiction to Senegalese courts over international crimes, particularly the inclusion of such crimes in the Senegalese Criminal Code, which were not previously foreseen, are aimed at prosecuting him for the indicated crimes.³⁵ Thus, in his opinion, Senegal violated the principle of non-retroactivity of criminal law and, therefore, violated his rights provided for in Article 7(2) of the African Charter on Human and Peoples' Rights and Article 11(2) of the Universal Declaration of Human Rights.³⁶

In its decision of 18 November 2010, the ECOWAS Court noted that there were indeed grounds for a possible violation of Hissène Habré's rights when the criminal law was applied retroactively. In addition, the Court noted that Senegal's mandate from the AU should be exercised per international law applicable to establishing *ad hoc* tribunals or other specialised international tribunals.³⁷ The Court also stated that otherwise, any actions of Senegal outside such norms of international law in this area may violate the principle of non-retroactivity of criminal law, enshrined in international human rights treaties as a human right.³⁸

31 Loi n° 2007-02 du 12 février 2007 modifiant le Code pénal du Sénégal.

32 Loi n° 2007-05 du 12 février 2007 modifiant le Code de procédure pénale relative à la mise en oeuvre du Traité de Rome instituant la Cour pénale internationale, Senegal // Journal officiel, 2007-03-10, n° 6332 (INFORM)

33 Loi constitutionnelle n° 2008-33 du 7 août 2008 modifiant les articles 9 et 95 et complétant les articles 62 et 92 de la Constitution // Journal officiel, 2008-08-08, n° 6420.

34 Hissein Habre v. Republic of Senegal, Judgment of 18 November 2010, No. ECW/CCJ/JUD/06/10.

35 Ibidem

36 Ibidem

37 Ibidem

38 Ibidem

Belgium, in turn, instituted proceedings before the International Court of Justice on 19 February 2009 with a request to recognise the fact that Senegal could not prosecute Hissène Habré in its national courts and did not extradite him to Belgium, which was a violation by Senegal of its international obligations arising from the Convention against Torture.³⁹ In 2012, the International Court of Justice unanimously found that Senegal had indeed failed to fulfil its obligations and, therefore, called on Senegal to prosecute Hissène Habré in its competent national courts or extradite him⁴⁰ (*aut dedere aut judicare*).

In his separate opinion, Judge Cançado Trindade noted that the ECOWAS Court's decision cannot justify this violation, as it was made only in 2010, and Senegal had not fulfilled its obligations earlier.⁴¹

Following the ECOWAS Court's decision on the need for compliance with the principle of non-retroactivity of criminal law, the AU Assembly of Heads of State and Government convened a meeting in January 2011 at its 16th ordinary session. As a result of that session, the Assembly requested the AU Commission to consult with the government of Senegal to finalise the conditions for the establishment of an International Specialised Court for the Hissène Habré case, taking into account the ECOWAS Court's decision.⁴² Following consultations, the government of Senegal and the AU Commission have concluded that it is necessary to agree on the establishment of African Extraordinary Chambers in Senegal.⁴³ Article 1(2) of this Agreement provides that the government of Senegal had to take legislative and administrative measures as soon as possible to establish African Extraordinary Chambers within Senegal's judicial system.⁴⁴ Following this, the National Assembly of Senegal passed a law on 28 December 2012 providing for the inclusion of the African Extraordinary Chambers in the Courts of Senegal.⁴⁵ The African Extraordinary Chambers officially became operational on 8 February 2013.⁴⁶

On 30 June 2013, Hissène Habré was arrested by the Senegalese police⁴⁷ and a criminal investigation was launched. In the meantime, Hissène Habré filed another application with the ECOWAS Court requesting to take provisional measures and

39 International Court of Justice (2013). Questions relating to the obligation to prosecute or extradite (Belgium v. Senegal), Judgment of 20 July 2012. In Reports of Judgments, Advisory Opinions and Orders (pp. 53–60). [Memorial of the Kingdom of Belgium].

40 Ibidem

41 Cançado Trindade, 2013.

42 African Union (AU). (31 January 2011). Assembly/AU/Dec.340(XVI). Décision on the Hissène Habré Case. AU Doc. Assembly/AU/9(XVI).

43 Gouvernement de la République du Sénégal & Union Africaine (2012). Accord entre le Gouvernement de la République du Sénégal et l'Union Africaine sur la création des Chambres africaines extraordinaires au sein des juridictions sénégalaises.

44 Ibidem

45 République du Sénégal (2012). Loi n° 2012-29 du 28 décembre 2012 modifiant l'article premier de la loi n° 84-19 du 2 février 1984 fixant l'organisation judiciaire. Journal officiel de la République du Sénégal, n° 6654.

46 See: Human Rights Watch, 2016.

47 See: Human Rights Watch, 2013.

the cessation of all actions by the Republic of Senegal prosecuting him under the African Extraordinary Chambers Act on the grounds that, in his opinion, the African Extraordinary Chambers were not lawfully created and did not comply with the previous decision of the ECOWAS Court, which contained a need to respect the rights of the accused, particularly the principle of non-retroactivity of the criminal law.⁴⁸

The ECOWAS Court, in its decision of 5 November 2013, indicated that it had no competence to assess the legality of international agreements concluded by the Member States or to suspend proceedings before them.⁴⁹ The Court also pointed out that there is no need or reason to prescribe interim measures in such a case.⁵⁰

The Extraordinary African Chambers include the Extraordinary African Investigative Chamber, the Extraordinary African Indicting Chamber, the Extraordinary African Trial Chamber, and the Extraordinary African Appeals Chamber.⁵¹

The Extraordinary African Investigative Chamber, which was dissolved after the indictment was issued on 13 February 2015, consisted of three judges of Senegalese nationality and one alternate judge of Senegalese nationality, who were nominated by the Senegalese Minister of Justice and appointed by the Chairperson of the AU Commission.⁵²

The Extraordinary African Indicting Chamber within the Dakar Court of Appeals was dissolved on 13 February 2015 and consisted of three judges of Senegalese citizenship and one deputy judge, also a Senegalese citizen, appointed by the Chairperson of the AU Commission on the proposal of the Minister of Justice of Senegal.

The African Extraordinary Trial Chamber with the Dakar Court of Appeals is composed of a president, two judges of Senegalese citizenship, and two deputy judges, also of Senegalese citizenship, appointed by the Chairperson of the AU Commission on the proposal of the Minister of Justice of Senegal. The President of the Chamber is a citizen of another AU Member State.⁵³

The Extraordinary African Appeals Chamber consists of a president, who is a national of a Member State of the AU other than Senegal, two judges, and two alternate judges who are citizens of Senegal, appointed by the Chairperson of the AU Commission on the proposal of the Minister of Justice of Senegal.⁵⁴

In the beginning, there was a question regarding which judicial body should be created: a special international tribunal (as in the case of the International Tribunal for Rwanda and the International Criminal Tribunal for the former Yugoslavia) or a

48 Human Rights Watch, 2013.

49 CEDEAO (2013) Arrêt N° ECW/CCJ/RUL/05/13 de la Cour de justice de la Communauté Economique des Etats de l'Afrique de l'Ouest.

50 Ibidem

51 Gouvernement de la République du Sénégal & Union Africaine (2012). Accord entre le Gouvernement de la République du Sénégal et l'Union Africaine sur la création des Chambres africaines extraordinaires au sein des juridictions sénégalaises.

52 Ibidem

53 Ibidem

54 Ibidem

hybrid tribunal similar to the Extraordinary Chambers for Cambodia, the SCSL, the Special Tribunal for Lebanon, the Special Panels for Serious Crimes in East Timor, or a purely national court with special jurisdiction?

The 2012 Agreement between Senegal and the AU (Article 1(4)) provides that the African Extraordinary Chambers 'of an international character shall apply their Statute, international criminal law, the Senegal Penal Code, the Senegal Code of Criminal Procedure and other relevant laws of Senegal'.⁵⁵

Considering the listed legal documents applied by the Chambers in their activities, it can be argued that the African Extraordinary Chambers are closer to internationalised criminal courts.

Some scholars consider the African Extraordinary Chambers to be a new type of judicial organ and do not classify it as an international or hybrid judicial institution,⁵⁶ while others equate it with a court of a foreign State that prosecutes crimes based on universal jurisdiction. Kersten and Ainley note that the concepts of hybrid courts, internationalised courts, and mixed tribunals are often used interchangeably, and they consider the African Extraordinary Chambers to be a hybrid court.⁵⁷

The Defence of Hissène Habré, in its memorandum to the ECOWAS Court, pointed out that contrary to a previous decision calling on Senegal to take action to establish a special tribunal of an international character, the African Extraordinary Chambers in their current format are rather a *sui generis* judicial institution. The Defence argued that the grounds for the establishment of the EAC and the procedure were the prerogative of Senegal and that it was because of it that some violations were committed in the process of determining EAC *sui generis* jurisdiction, which, in the Defence's view, did not meet the criteria and standards governing the activities of special international tribunals, and violated the rights of the accused (Arrêt N° ECW/CCJ/RUL/05/13, 2013, para. 8).⁵⁸

In its decision of 5 November 2013, the ECOWAS Court of Justice indicated that, although the African Extraordinary Chambers were established within the national courts of Senegal, they are international in nature, taking into account, on the one hand, the fact that they were created on the basis of international agreement and applicable law contained in their Statute, which differs from the provisions of national legislation of Senegal, and, on the other hand, due to the fact that their location on the territory of Senegal and the sitting of national judges in the Chambers does not deprive them of their international character. The ECOWAS Court has found that the international agreement by which the African Extraordinary Chambers were created and the rules of procedure established in their Statute endow them with an international character (Arrêt N° ECW/CCJ/RUL/05/13, 2013, para. 47).⁵⁹

55 Ibidem

56 Cimiotta, 2015, pp. 177–197.

57 Ainley & Kersten, 2020, pp. 969–974.

58 CEDEAO. (2013). Arrêt N° ECW/CCJ/RUL/05/13 de la Cour de justice de la Communauté Economique des États de l'Afrique de l'Ouest.

59 Ibidem - para. 47.

It should be noted that there is no generally accepted definition of internationalised or hybrid criminal courts (tribunals). The doctrine has developed several common features that allow one or another judicial body to be classified as an internationalised criminal tribunal.

Tolstykh notes, Damgaard identifies the following criteria to determine the international nature of a court: 1) the legal basis of an international criminal court is either an international treaty between two or more states, or a Security Council resolution adopted in accordance with Chapter VII of the UN Charter, or an agreement between the UN and one or more States; 2) the international criminal court is not part of the judicial system of one State; 3) the court applies international criminal law; 4) its jurisdiction *ratione materiae* and *ratione personae* is international; 5) its decisions are legally binding.⁶⁰

Therefore, given these criteria, it can be argued that the African Extraordinary Chambers are an internationalised judicial institution, meaning that the court operates within the national judicial system but has an international character (created in accordance with international agreement, international funding, and international staff).

The Statute of the African Extraordinary Chambers provides that the Chambers have the power to prosecute and try the person or persons most responsible for crimes and serious violations of international law, customary international law and international conventions ratified by Chad, committed in the territory of Chad during the period from 7 June 1982 to 1 December 1990⁶¹ (Article 3(1) Statute of the Chambers).

Article 24(1) of the Statute provides that the Chambers may sentence a convicted person to imprisonment for a term not exceeding 30 years or life imprisonment.⁶²

It follows from these two provisions that the African Extraordinary Chambers have a judicial function of a criminal nature. With regard to the temporary nature of the institution, the African Extraordinary Chambers, pursuant to Article 37(1) of the Statute, 'shall be dissolved in their own right once all judgments are final'.⁶³

Concerning the EAC funding, the establishment and operation of the African Extraordinary Chambers are funded by a budget composed of contributions from Senegal and other international donors. It is worth noting that the trial financing over Hissène Habré was carried out mainly through contributions from Chad, the European Union, the AU, the United States, the Netherlands, Germany, France, and other States.⁶⁴ Therefore, we can say that there was international financial support.

60 Tolstykh, 2011, pp. 111–123.

61 Gouvernement de la République du Sénégal & Union Africaine. (2012). Accord entre le Gouvernement de la République du Sénégal et l'Union Africaine sur la création des Chambres africaines extraordinaires au sein des juridictions sénégalaises.

62 Ibidem

63 Ibidem

64 International Federation for Human Rights. (2013). Senegal: Hissène Habré court opens extraordinary African Chambers to try former Chadian dictator.

With regard to jurisdiction *ratione temporis* and *ratione loci*, the Chambers prosecuted international crimes committed from 7 June 1982 to 31 December 1990 in Chad, with an aim to hold accountable those most responsible (jurisdiction *ratione personae*).

Regarding material jurisdiction, the Chambers have the right to prosecute war crimes, crimes against humanity, and the crime of genocide and torture.⁶⁵ All these crimes under the Chambers' jurisdiction are considered the most serious crimes of concern to the entire international community.

Regarding the participation of an entity other than the State affected by the tribunal, it should be noted that the establishment of the African Extraordinary Chambers results from negotiations between Senegal and the AU. Regarding the presence of international judges in Chambers, it should be noted that two of the twenty judges are citizens of other AU Member States.⁶⁶ Therefore, it can be concluded that the African Extraordinary Chambers can be classified as an internationalised court.

As a result of its activities, on 30 May 2016, the Extraordinary African Chambers sentenced Hissène Habré to life imprisonment for torture, war crimes, and crimes against humanity committed during his rule.⁶⁷ Besides Hissène Habré, several other individuals were suspected of committing international crimes in Chad, falling under the jurisdiction of the Chambers, but subsequently, these persons did not appear before the African Extraordinary Chambers⁶⁸ because the Republic of Chad did not transfer some of them to the Chambers (indicating, that they were prosecuted in the national courts of Chad) and the whereabouts of the others were not known.

The African Extraordinary Chambers can serve as a good example for the creation and functioning of regional criminal mechanisms in Africa, taking into account regional specificities.⁶⁹

Kayumova rightly notes that the establishment in 2013 of the African Extraordinary Chambers with the participation of the African Union opens up new prospects for hybrid criminal justice since it creates a precedent for a regional approach to the internationalisation of national justice, ensures relative independence from the decisions of the UN Security Council and demonstrates the possibility of international criminal justice alternatives to the International criminal court.⁷⁰

The effective activities of the African Extraordinary Chambers demonstrate that African States can, when there is a political will, through regional organisations or

65 Gouvernement de la République du Sénégal & Union Africaine. (2012). Accord entre le Gouvernement de la République du Sénégal et l'Union Africaine sur la création des Chambres africaines extraordinaires au sein des juridictions sénégalaises.

66 Ibidem

67 See: Chambres Africaines Extraordinaires (Ministère public c. Hissène Habré). Jugement. 30 mai 2016.

68 Ibidem

69 Adu, 2016, p. 4.

70 Kayumova, 2016, p. 441.

independently by implementing universal jurisdiction, prosecute those responsible for serious, large-scale crimes in line with international standards of fair trial, since the necessary international legal framework already exists for these purposes. In this regard, it can be confidently asserted that regional initiatives and mechanisms can fill the gaps that may arise in connection with the exacerbation of tension between States and international judicial institutions (for example, between African States and the ICC) in the field of international criminal justice.

6.2. The Special Court for the Central African Republic

The recently established SCCAR is one of the international criminal justice mechanisms established in Africa to deal with international crimes.

In December 2004, the CAR referred the situation on its territory to the ICC, and, for the second time, the situation in the CAR was referred to the ICC in March 2014. It should be noted that in February 2014, the ICC prosecutor announced that she intended to start a preliminary investigation of the situation in the CAR. In April 2014, Samba-Panza (former President of the CAR) established special chambers of inquiry with the mandate to investigate serious violations of international human rights and humanitarian law that had occurred since 2004.⁷¹

At that time, the UN proposed to create a specialised tribunal in the CAR with jurisdiction over international crimes. In August 2014, the UN and the CAR government signed a Memorandum of Understanding on the Special Criminal Court.⁷²

On 5 June 2015, the CAR adopted an organic law on the establishment, organisation, and functioning of the Special Court⁷³ to prosecute persons guilty of serious crimes in the CAR during ongoing armed conflicts.

The SCCAR, by its legal nature, differs from other international and internationalised tribunals, which have been created in the past on the basis of international agreements between States and the UN. It differs, for example, from the SCSL, the Special Tribunal for Lebanon, and the Extraordinary African Chambers, which were established through agreements between States and international organisations (UN, AU), whereas the SCCAR was established by a national law. The SCCAR is part of the national judicial system of the CAR.

The SCCAR mainly applies the national law of the CAR, particularly the Criminal Code and the Code of Criminal Procedure, and international law can be applied only in the case of a gap in the domestic law. This is another feature of the SCCAR compared to hybrid criminal institutions regarding applicable law.

71 The New Humanitarian. (2014). La République centrafricaine en quête de justice.

72 MINUSCA. (2014). Memorandum of Understanding between the Central African Government and the United Nations Multidimensional Integrated Stabilisation Mission in the Central African Republic.

73 See Loi Organique N°15.003 Du 03 Juin 2015, Portant Creation, Organisation Et Fonctionnement De La Cour Penale Speciale.

It should be mentioned that the International Commission of Inquiry on the CAR in 2015 recommended the creation of an international criminal tribunal for the CAR, or that the majority of the judges must be international.⁷⁴ Eventually, it turned out that among judges and prosecutors of the SSCAR, 13 are CAR citizens, and 12 are citizens of foreign countries.

The SCCAR consists of four organs: the Court, the Secretariat, the Office of the Special Prosecutor, and the Special Unit of the Judicial Police. The SCCAR has four chambers: a pre-trial investigative chamber, a special indictment chamber, a trial chamber, and an appeals chamber. In addition, it is provided for creating a special chamber of defence and the possibility of providing legal assistance to suspects, accused, and victims.

Article 9 of the Organic Law states that, with the exception of the Special Judicial Police Unit and the Secretariat of the Special Prosecutor, all the main organs of the Court include at least one international staff member who is appointed by the UN Mission in CAR (MINUSCA) but approved by the CAR authorities.

The investigative chamber consists of three divisions. Each division includes two judges, that is, one national judge and one international judge. The president of the investigative chamber is a national judge elected by a simple majority of the judges. The investigative chamber and its constituent divisions are built by analogy with the investigative chambers within the higher tribunals of the CAR.⁷⁵

The special indictment chamber is composed of two international judges and one national judge. It has the competence to review the decisions of the investigative chamber.

The trial chamber hears criminal cases on the merits, referred to by the investigative chamber and the special indictment chamber (in the case when there is an appeal against the decision of the investigative chamber). Consequently, complaints against the decisions of the investigative chamber are submitted to the special indictment chamber, which, in turn, transfers its decisions to the trial chamber for further trial of the cases, if necessary. The trial chamber consists of six national judges and three international judges.

The appeals chamber consists of three judges (one national and two international). It hears appeals against the decisions of the trial chamber and the special indictment chamber. The national judges of the CAR chair all these chambers.

The SCCAR Prosecutor's Office comprises a special international prosecutor, his deputy (citizen of the CAR), and two deputy prosecutors.

The SCCAR officially began its activities on 22 October 2018, when the president and his deputy were appointed, and the Rules of Procedure of the Court were

74 United Nations. (2015). Central African Republic: UN investigators urge establishment of war crimes tribunal.

75 See Loi Organique N°15.003 Du 03 Juin 2015, Portant Creation, Organisation Et Fonctionnement De La Cour Penale Speciale.

adopted.⁷⁶ The SCCAR has a term of five years and is renewable. On 5 December 2018, the SCCAR adopted and published a prosecution strategy, which sets out the procedure for selecting cases to be investigated.⁷⁷ It can be assumed that this was done with the intention to ensure the objectivity and impartiality of the prosecutor in choosing the persons or crimes for which investigations can be carried out.

It should be noted that, unlike other hybrid and international criminal justice institutions, the SCCAR's jurisdiction *ratione materiae* is not limited to the core four international crimes (genocide, war crimes, crimes against humanity, crime of aggression). According to Article 3 of the Organic Law establishing the SCCAR, it has jurisdiction over 'serious violations of human rights and international humanitarian law, in particular genocide, crimes against humanity and war crimes'. In this regard, it should be noted that not all serious violations of human rights qualify as international crimes (genocide, crimes against humanity, war crimes, aggression) that the SCCAR can prosecute.

With regard to the jurisdiction *ratione temporis* and *ratione loci*, the SCCAR has jurisdiction over crimes committed from 1 January 2003 to present in the territory of the CAR and other States with which the CAR has agreements on mutual legal assistance in criminal matters in the case of complicity of foreign citizens in the commission of crimes within the jurisdiction of the Special Court.

One of the important features of the SCCAR is the fact that its jurisdiction *ratione personae* extends not only to individuals but also to legal entities involved in the commission of crimes falling under its jurisdiction. This is because the Special Court applies the national law of the CAR, and Articles 10, 159, and 160 of the Criminal Code of the CAR provide for the criminal responsibility of legal entities.⁷⁸ Article 10 indicates that the category of legal entities does not include the State, and that the liability of legal entities does not exclude the liability of individuals in the event that they somehow took part in the commission of the relevant crimes.⁷⁹ It must be emphasised that corporate criminal liability is also provided for in the Malabo Protocol on the African Court.

There are currently three judicial mechanisms operating simultaneously in the CAR to hold accountable those guilty of committing international crimes: the SCCAR, the ICC, and national courts. In accordance with the principle of complementarity, the SCCAR and the national courts have priority in investigating and prosecuting crimes, and the ICC can intervene when the said courts are unable or unwilling to bring those responsible to justice. Moreover, Article 37 of the Organic Law on the SCCAR stipulates that in the event that it is known that the ICC is investigating a case falling within the competence of the SCCAR, preference is given to the ICC. In

76 United Nations. (2018). RCA: l'inauguration de la Cour pénale spéciale marque la fin de l'impunité (MINUSCA).

77 See: Stratégie d'enquêtes de poursuites et d'instructions du 04 décembre 2018.

78 Ibidem

79 République centrafricaine. (2010). Loi n° 10.001 portant Code pénal centrafricain.

this case, the principle of complementarity within the meaning of the Rome Statute is not respected; however, given that, despite the SCCAR being a hybrid court, it is a part of the CAR's national judicial system and the principle of complementarity should be observed.

Although the ICC conducts investigations in African States, the creation of hybrid courts can contribute to the best realisation of international criminal justice, given the complicated work to collect evidence, facilitate the participation of all interested actors (witnesses, victims, etc.), as well as the process of reconciliation.

It should be noted that the activities of special hybrid courts in Africa are effective and can, in certain cases, be useful alternatives for the ICC.

6.3. The Special Court for Sierra Leone

The SCSL was the first hybrid court created in Africa on the basis of an agreement between the UN and an African State (Sierra Leone) at the request of the latter. In 2000, the government of Sierra Leone requested the UN for assistance in establishing a special criminal court to take responsibility for those responsible for committing serious crimes during its civil war.⁸⁰ The UNSC, in its Resolution 1315(2000),⁸¹ subsequently requested the UN Secretary-General to negotiate an agreement with the government of Sierra Leone to create such a Special Court to try those most responsible for international crimes and other serious crimes under Sierra Leonean law.⁸² The UNSC Resolution 1315 stated that 'a credible system of justice and accountability for the very serious crimes committed [in Sierra Leone] would end impunity and would contribute to the process of national reconciliation and the restoration and maintenance of peace'.⁸³

On 16 January 2002, an agreement was signed between the UN and the government of Sierra Leone to establish the SCSL.⁸⁴ The Statute of the Court was annexed to the Agreement, which entered into force on 12 April 2002.

With regard to jurisdiction *ratione materiae*, according to the Statute, the SCSL has jurisdiction over war crimes (Article 3), crimes against humanity (Article 2) and other gross violations of international humanitarian law (Article 4), as well as various crimes provided for by the national legislation of Sierra Leone (Article 5).

Article 2 of the Statute stipulates that the Special Court has the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996. The agreement in force between the United Nations and the Government of Sierra Leone or agreements between Sierra Leone and other

80 Cryer, Warbrick & McGoldrick, 2001, pp. 435–446.

81 United Nations Security Council. (2000). Resolution 1315(2000).

82 Frulli, 2000, pp. 857–869.

83 United Nations Security Council. (2000). Resolution 1315(2000).

84 United Nations. (2002). Agreement between the United Nations and the Government of Sierra Leone on the establishment of a Special Court for Sierra Leone.

Governments or regional organisations, or, in the absence of such agreement, provided that the peacekeeping operations were undertaken with the consent of the Government of Sierra Leone, shall be within the primary jurisdiction of the sending State (par. 2). In the event the sending State is unwilling or unable genuinely to carry out an investigation or prosecution, the Court may if authorised by the Security Council on the proposal of any State, exercise jurisdiction over such persons.⁸⁵

This means that the Court could prosecute not only those directly involved in the conflict (as parties to the conflict) but also peacekeepers who committed the crimes under its jurisdiction.

Article 2 of the Statute provides that the Court has jurisdiction over the following crimes against humanity committed as part of a widespread or systematic attack against any civilian population: murder; extermination; enslavement; deportation; imprisonment; torture; rape, sexual slavery, enforced prostitution, forced pregnancy, and any other form of sexual violence; persecution on political, racial, ethnic, or religious grounds, and other inhumane acts.⁸⁶ The Court also has jurisdiction over serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977 (violence to life, health, and physical or mental well-being of persons, particularly murder, as well as cruel treatment such as torture, mutilation, or any form of corporal punishment; collective punishments; taking of hostages; acts of terrorism; outrages upon personal dignity, particularly humiliating and degrading treatment, rape, enforced prostitution, and any form of indecent assault; pillage; the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees that are recognised as indispensable by civilised peoples; threats to commit any of the foregoing acts);⁸⁷ and other serious violations of international humanitarian law, including intentional attacks against the civilian population as such or against individual civilians not taking direct part in hostilities; intentional attacks against personnel, installations, material, units, or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the UN Charter, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict; and conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities.⁸⁸ The following crimes under Sierra Leonean law were also put under the jurisdiction of the Court: the abuse of girls under the 1926 Prevention of Cruelty to Children Act and the wanton destruction of property under the 1861 Malicious Damage Act (such as setting fire to dwelling – houses with any person in – and

85 See: Statute of the Special Court for Sierra Leone.

86 Ibidem

87 Ibidem

88 Ibidem, Article 4.

setting fire to public and other buildings).⁸⁹ As C. Jalloh notes, the Special Court's jurisdiction over crimes under national Sierra Leonean law was included at the request of the then Sierra Leone president Kabbah to help foster a sense of local ownership of the SCSL and its processes; to allow greater flexibility to the Prosecutor to pick and choose which of national and or international offences to charge suspects with; and finally, to cast a wider net to ensure that the leaders responsible for the atrocities would not escape punishment.⁹⁰

Regarding personal jurisdiction, the Court had jurisdiction over physical persons who allegedly committed one of the crimes falling under its jurisdiction, including persons between the ages of 15 and 18 years (at the time of the commission of the crimes). This means that minors could be prosecuted and bear criminal responsibility before the SCSL. International human rights organisations and groups protecting child rights have actively contested the measure. Some scholars argue that the Statute of the SCSL introduced comprehensive guarantees to protect juvenile offenders, including creating juvenile chambers and taking measures to protect the privacy of juveniles.⁹¹

The jurisdiction *ratione temporis* covered crimes committed after 30 November 1996, although this was strongly opposed by representatives of the government of Sierra Leone, who wanted the Court to also deal with crimes committed since the beginning of the conflict, that is, since March 1991. The jurisdiction *ratione loci* has been reduced to crimes within Sierra Leone's territory.

In March 2003, the prosecutor issued 13 separate indictments against leaders of the main armed groups involved in the armed conflict: the Revolutionary United Front (RUF), the Armed Forces Revolutionary Council (AFRC), and the Civil Defence Forces (CDF). These indictments were later combined into three main trials. The prosecutor also issued an indictment against the then-President of Liberia, Charles Taylor.⁹²

In March 2003, the first indictments in the RUF case were issued against the RUF leader Foday Saybana Sankoh and some high-ranking officers, namely Sam Bockarie, Issa Hassan Sesay, Morris Kallon, and in April 2003, Augustine Gbao was indicted. The indictments against Sankoh and Bockarie were dropped following their death.⁹³

Sesay, Kallon, and Gbao were charged with crimes against humanity, war crimes, and other serious violations of international humanitarian law, which included murder, rape, sexual slavery, other inhumane acts, violence to life, terrorising the civil population, collective punishments, mutilation, pillage, use of child soldiers,

89 Ibidem

90 Jalloh, 2010, pp. 395–460.

91 Frulli, 2000, pp. 857–869.

92 Jalloh, 2010, pp. 395–460.

93 Ibidem

and attacks on UN peacekeeping personnel.⁹⁴ They were sentenced to fifty-two, forty, and twenty-five years in prison, respectively.⁹⁵

Regarding the AFRC case, indictments were issued against Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu. The trials of Brima, Kamara, and Kanu were combined into one case in 2004. The joint indictment contained fourteen counts, including war crimes and crimes against humanity of murder, extermination, rape, acts of terrorism, collective punishments, unlawful killings, sexual violence, use of child soldiers, enslavement, and other inhumane acts. In 2006, they were guilty of war crimes and crimes against humanity. The SCSL sentenced Brima and Kanu to fifty years in prison each, whereas Kamara was sentenced to forty-five years of imprisonment.⁹⁶

In the CDF case, three members of CDF, namely Moinina Fofana, Allieu Kondewa, and Sam Hinga Norman, were charged with war crimes, crimes against humanity, and other serious violations of international humanitarian law. Their trials were combined in January 2004, and the SCSL terminated proceedings against Norman because he died in custody before the sentence was issued. The Court found Fofana and Kondewa guilty of war crimes and crimes against humanity that included murder, child recruitment, collective punishments, violence to life, health, and physical or mental well-being of persons, and pillaging.⁹⁷ They were sentenced to fifteen and twenty years in prison, respectively. All RUF, AFRC, and CDF members who were sentenced to imprisonment were transferred to Mpanga prison in Rwanda.⁹⁸

In September 2020, the Residual SCSL issued a press release according to which the former RUF commander Augustine Gbao was granted conditional early release to serve the remainder of his sentence in his native community, with the following additional conditions: There is a requirement that Gbao apologises on radio and television to the victims of his crimes and the people of Sierra Leone. His apology must include accepting responsibility for his crimes and harm to the peace process. He must also express remorse, commit to reconciliation and maintenance of peace in Sierra Leone, and not associate with any ex-combatants or other persons convicted by the Special Court. These conditions require Gbao to cooperate with a Monitoring Authority, obey all orders of the Court, refrain from committing any crime, and pose no threat to former witnesses, among others.⁹⁹

94 Special Court for Sierra Leone (2009) *The Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao (the RUF Accused)* (Trial Judgment), Case No. SCSL-04-15-T.

95 *Ibidem*

96 Special Court for Sierra Leone. (2007). *The Prosecutor vs. Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu (the AFRC Accused)*, SCSL-04-16-T.

97 Special Court for Sierra Leone. (2008). *The Prosecutor v. Moinina Fofana, Allieu Kondewa (the CDF Accused)* (Appeal Judgment), SCSL-04-14-A.

98 Jalloh, 2010, pp. 395–460.

99 Residual Special Court for Sierra Leone's Press Release. (2020). RUF convict Augustine Gbao granted conditional early release, with a three month delay.

In December 2020, Augustine Gbao was transferred from Mpanga Prison to Sierra Leone.¹⁰⁰

It should be mentioned that Moinina Fofana and Alieu Kondewa were granted conditional early release and returned to Sierra Leone in March 2015 and July 2018, respectively. Both of them were conditionally released after serving two-thirds of their sentences.¹⁰¹

7. Charles Taylor's case

The former President of Liberia, Charles Taylor, was the only non-Sierra Leonean person indicted by the SCSL. From 1989 to 1997, Taylor led a rebel group, the National Patriotic Front of Liberia (NPFL), which was fighting to remove the then-president of Liberia, Samuel K. Doe, and take control of the country. The conflict ended on 2 August 1997, when Taylor became president.¹⁰² He ruled Liberia from 1997 to 2003.

It is alleged that some forces under Taylor's command have been involved in supporting and participating in armed conflicts and human rights abuses in neighbouring countries, including Sierra Leone, Guinea, and Côte d'Ivoire.¹⁰³

Taylor relinquished power in August 2003 following a peace deal in Liberia and the indictment against him by the SCSL for crimes committed in Sierra Leone and supporting and cooperating with armed groups, namely RUF, AFRC, and CDF, involved in the armed conflict in Sierra Leone (some of the members of these armed groups were indicted by the SCSL as discussed above). Taylor fled to Nigeria, where he was granted asylum but was transferred to the SCSL in March 2006.¹⁰⁴

On 16 June 2006, the UNSC issued Resolution 1688, which it stated that the presence of Taylor in the sub-region impeded stability and posed a threat to peace.¹⁰⁵ On 20 June 2006, he was transferred to The Hague. The trial was held by the SCSL, initially in an ICC courtroom and later in a courtroom at the Special Tribunal for Lebanon. Jalloh asserts that the decision to transfer Taylor to The Hague caused a 'serious blow to the legitimacy of the SCSL among Sierra Leoneans, as many wished to have closer and easier access to the trial'.¹⁰⁶

100 Residual Special Court for Sierra Leone's Press release. (2020). SCSL convict Augustine Gbao is first member of the rebel Revolutionary United Front to benefit from conditional early release.

101 Ibidem

102 Human Rights Watch. (2012). Charles Taylor: Questions et réponses sur l'affaire du procureur contre Charles Ghankay Taylor au Tribunal spécial pour la Sierra Leone (TSSL).

103 Ibidem

104 Ibidem

105 United Nations (2006) Security Council Resolution 1688, U.N. Doc. S/RES/1688.

106 Jalloh, 2010, pp. 395–460.

Taylor was charged with eleven counts of war crimes, crimes against humanity, and other serious violations of international humanitarian law, including murder; acts of terrorism; the use of child soldiers; pillage; violence to life, health, and physical or mental well-being of persons, particularly cruel treatment, sexual slavery, rape, and other forms of sexual violence; and outrages against personal dignity.¹⁰⁷

On 26 April 2012, the SCSL Trial Chamber found Charles Taylor guilty of all eleven counts of planning crimes and of aiding and abetting crimes committed by rebel forces in Sierra Leone and sentenced him to 50 years in prison.¹⁰⁸ This sentence of 50 years was upheld by the appeals chamber.¹⁰⁹ He was transferred to the United Kingdom (UK) to serve his 50-year sentence.

In 2020 Charles Taylor asked the Residual SCSL to allow him to be transferred to a third safe country, arguing that, ‘due to the “massive outbreak of COVID-19 in the UK”, his continued detention in that country posed a substantial risk to his right to life’; however, the Residual SCSL dismissed Taylor’s request.¹¹⁰

8. Conclusion

In conclusion, recent years have witnessed a growing interest in establishing international criminal courts at the regional level, aimed at prosecuting individuals responsible for international and transnational crimes. This growing interest reflects the recognition that combating certain crimes is significant for specific regions, considering their unique characteristics and needs.

The concept of complementarity, as outlined in the Rome Statute of the ICC, suggests that the Court should intervene only when national jurisdictions are unwilling or unable to prosecute crimes falling under their jurisdiction. With the establishment of regional judicial bodies in the field of international criminal law, particularly in Africa, questions will definitely arise regarding the allocation of jurisdiction and the coordination of efforts between these bodies and the ICC. It can be argued that prioritising the jurisdiction of a future regional African Criminal Court over the ICC within the African region aligns with the principles of sovereignty and regional autonomy. Such an approach would ensure that regional bodies take the lead in administering justice while respecting the international framework established by the ICC.

107 Residual Special Court for Sierra Leone. (2007). *Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-2003-01-PT, Amended Indictment.

108 Residual Special Court for Sierra Leone. (2012). *Prosecutor v. Charles Ghankay Taylor* (Judgement Summary), SCSL-03-1-T, Special Court for Sierra Leone, 26 April 2012.

109 Residual Special Court for Sierra Leone. (2013) *The Prosecutor v. Charles Ghankay Taylor*. SCSL Appeals Chamber, 26 September 2013.

110 Residual Special Court for Sierra Leone’s Press Release. (2020). Charles Taylor’s application to be transferred from the UK due to COVID-19 dismissed.

However, to address these complexities, it is essential to establish a framework for cooperation and coordination between the ICC and regional courts. A formal agreement among the ICC, the AU, and African regional organisations could serve as a mechanism for resolving jurisdictional issues and ensuring a balanced approach to prosecuting serious crimes. Such an agreement would clarify the roles and responsibilities of each entity, thereby promoting synergy and avoiding the duplication of efforts.

Based on the aforementioned cases that were successfully dealt with by African judicial bodies, to avoid or end speculation on whether the ICC is biased regarding African nationals, the creation of an African regional criminal court would represent a positive step towards combating serious crimes in Africa and achieving Sustainable Development Goal 16, which aims to promote peace, justice, and strong institutions. These courts can potentially address the unique challenges African nations face in addressing impunity and ensuring accountability for grave human rights violations.

Moreover, establishing hybrid tribunals in Africa has demonstrated its effectiveness in delivering justice. The trial of Hissène Habré in the African Extraordinary Chambers stands as a landmark example of universal jurisdiction being applied in Africa. Through an agreement between the AU and the host State, Senegal, Habré, Chad's former Head of State, was brought to trial for crimes and gross violations of human rights committed in his country. This case showcases regional and international actors' collaborative efforts to seek justice for victims and hold perpetrators accountable.

Overall, establishing national criminal courts and hybrid tribunals in Africa signifies a significant step towards achieving justice for victims of serious crimes. However, the effective coordination and cooperation between these regional bodies and the ICC are essential to ensure a cohesive approach to combating impunity and promoting accountability across the African continent. Through dialogue and collaboration, African nations can work towards building a stronger and more effective justice system that serves the interests of all stakeholders and contributes to the realisation of a more just and peaceful world.

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THE PROTECTION OF THE ENVIRONMENT UNDER THE ROME STATUTE



GÁBOR KECSKÉS

Abstract

The protection of the environment has long been part of the discourse of international humanitarian law, as has so-called “ecocide” within international criminal law. However, neither of these strict and detailed regimes of international law explicitly articulate the absolute and unrestricted protection of the environment during armed conflicts. Noted only implicitly, it remains subject to the interpretation of the relevant existing norms. This article provides a comprehensive normative overview of this particular topic. This analysis focuses on binding international treaty provisions, customary international law—having emerged from State-based domestic rules and internationally accepted customs—and other relevant, chiefly non-binding documents with soft law characteristics. This article reviews the most relevant treaties, including the 1949 post-war four Geneva Convention (as the basis of international humanitarian law), the 1976 Environmental Modification Convention, Additional Protocol I and II of 1977, and the 1998 Rome Statute, among other relevant multilateral environmental agreements. Particular focus is placed on criminal and humanitarian issues as well as soft law mechanisms under the United Nations universal system. This article evaluates the meaning and interpretation of the 1998 Rome Statute, concluding that the protection of environment can be interpreted under this Statute.

Keywords: ecocide, Rome Statute, causality, environmental damage, war crimes

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1. Introduction

This article presents a normative overview of the protection of environment under the relevant norms of international criminal law and international humanitarian law. As the category of environmental crimes is not an *expressis verbis* crime under the existing normative regimes, it is worth analysing the entire field of environmental protection in terms of criminal aspects under international criminal law regimes.

Unfortunately, even early humans found ways to intentionally damage their natural surroundings, particularly where doing so to the environment of other groups could indirectly promote their “military” aims. There is no end to the list of such activities over the course of human history. A “historical breakthrough” occurred in 1990–1991, when Iraq annexed Kuwait, triggering the Gulf War, and intentionally burned hundreds of oil wells in the territory of Kuwait, causing well-documented, widespread environmental harm. The deplorable impacts of these acts were broadcast in real time by globally accessible telecommunication channels, leading to significant public outcry.¹

That said, it is worth noting that the emergence of new forms of warfare in the nineteenth century resulted in every international armed conflict severely damaging and spoiling the natural environment. Consequently, the protection of the environment under international humanitarian and criminal regimes has gradually entered discussions on the lawmaking process. However, the meaning of protection of the environment can be two-fold. In the first case, the environment itself is the protected object, and it is here that the term “ecocide” emerges.² In the second—and potentially more viable—case, the protection of the environment is essential for the protection of individuals by mitigating detrimental effects on humankind, including potential genocide or war crimes, given that the destruction of the environment can lead to a significant decline in the quality of life, triggering conflict. Therefore, consciously intended environmental damages can cause significant loss and suffering, potentially but not necessarily inducing serious international crimes.

Despite the somewhat narrow title, this analysis goes well beyond the text of the Rome Statute to include the most relevant laws, rules, and practices dealing with the protection of the environment within the fields of international criminal law and international humanitarian law.

1 Roberts, 1993, pp. 538–553; Warbrick, 1991, pp. 482–492.

2 Cf. Frisso, 2023, pp. 1–22; Palarczyk, 2023, pp. 147–207.

2. Ecocide as a Wishful Concept

Regarding the notion of “ecocide”, it is important to recognise that ecocide is not considered an international war crime at present, at least not directly, and is currently bound to the theoretical literature. That said, some forms of ecocide can be labelled war crimes. Moreover, while the 1998 Rome Statute, and its amendments, does not explicitly list environmental crimes, the four core crimes it covers—namely, genocide, war crimes, crimes against humanity, and crime of aggression—can have significant environmental consequences. The concept of ecocide, that is, the intentional destruction of the environment, is gaining increasing attention as a so-called “fifth crime” under the jurisdiction of the International Criminal Court (ICC). Following protracted debate on the term “ecocide”, the best definition was provided by the Independent Expert Panel for the Legal Definition of Ecocide in 2021. This non-binding, NGO-backed opinion proposed the amendment to the Rome Statute, specifically, amending Article 8 of the Rome Statute by adding Article 8ter. The Independent Expert Panel defined ecocide as ‘unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts’.³ They added that “wanton” ‘means with reckless disregard for damage which would be clearly excessive in relation to the social and economic benefits anticipated’, while the word “severe” refers to damage ‘which involves very serious adverse changes, disruption or harm to any element of the environment, including grave impacts on human life or natural, cultural or economic resources’. The Independent Expert Panel also defined the terms “widespread”, “long-term”, and “environment” as used in the material.⁴

Five years prior to the 2021 non-official proposal, the Office of the Prosecutor of the ICC published a policy document entitled, ‘Policy Paper on Case Selection and Prioritization’ (15 September 2016), which contended that ‘the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land’ can be considered war crimes.⁵

Based on the aforementioned documents, the common elements of ecocide can be understood to comprise: (i) environment as a victim, (ii) the meaning of harm,

- 3 Kai Ambos persuasively argued that the ecocide should also cover any unlawful and wanton conduct irrespective of whether they are committed under the aegis of military activity. Ambos also emphasised that the anticipated environmental damage is defined partly cumulatively and partly alternatively, and that the “substantial likelihood”, rather than the certain occurrence, of the environmental damage is the object of reference of the mental element. Ambos, 2021.
- 4 “Widespread” means damage that extends beyond a limited geographic area, crosses state boundaries, or is suffered by an entire ecosystem or species or a large number of human beings. “Long term” means damage that is irreversible, or which cannot be redressed through natural recovery within a reasonable period of time. The term “environment” means the Earth, its biosphere, cryosphere, lithosphere, hydrosphere, and atmosphere, as well as outer space. Cf. Independent Expert Panel for the Legal Definition of Ecocide, 2021.
- 5 Policy Paper on Case Selection and Prioritization, 2016.

and (iii) the causal nexus (serious causality link) between the harm and the committed activity or omission thereof.

Analysing these literature-based and non-official proposals raises serious questions that cannot be resolved as yet, indicating an almost negligible chance for successful lawmaking. Assuming that we are living in a deteriorating environment amidst global biodiversity mass extinction and huge environmental challenges, then the first question that needs to be answered is what the threshold for destruction is, and to what extent an individual can be held responsible. This fundamental question of criminal law cannot be resolved theoretically, suggesting that the term “ecocide” is a concept for legal scholarship rather than a plausible amendment within the normative field of international law. However, domestic legal systems, such as French and Belgian criminal law, already regulate ecocide as a separate criminal offence.

3. The Normative Background of International Environmental Crimes

3.1. *The Environment and the Rome Statute*

The 1998 Rome Statute does not mention environmental crimes in an *expressis verbis* fashion.⁶ Nonetheless, it is easily inferred that the destruction of the environment can be a war crime. War crimes are listed within Article 8, para (2) of the Rome Statute. Article 8 (2) (b) defines “war crimes” as:

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

- (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;*
- (ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;*
- (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peace-keeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;*
- (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment*

6 Freeland, 2015; Gillett, 2017, pp. 220–253; Gillett, 2022, pp. 53–133.

which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.

From the aforementioned concept of war crimes, only point (iv) has definitive relevance, as it highlights the damage to the natural environment. This specific part of the definition comprises the following elements: (i) the perpetrator intentionally launched an attack; (ii) with the knowledge that such attack would cause incidental loss of life or injury to civilians or damage to civilian objects; (iii) or widespread, long-term, and severe damage to the natural environment; (iv) which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated. The latter point is the most problematic part of the cited definition, as this “advantage” is rarely communicated or transpires in an anticipatory manner. Indeed, the exact meaning of “military necessity” and “military advantage” can be arbitrarily communicated and interpreted by the States involved in the activities, even by the specific State that committed the violation or attacked first. Should widespread, long-term, and severe damage to the natural environment be determined, the “excessive” character of the ‘concrete and direct overall military advantage anticipated’ is almost certainly controversial and arguable. Moreover, regardless of whether the long-term and severe environmental damage and negative effect on the environment take place immediately after the committed crime or occur years later, a potential issue arises when the direct cause between the crime and the damage cannot clearly established.

However, the ICC published a document entitled, ‘Elements of Crimes’,⁷ in which the Court identified five elements of a ‘war crime of excessive incidental death, injury, or damage’ (Article 8 [2] [b]). First, the perpetrator launches an attack. Second,

[T]he attack was such that it would cause incidental death or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment and that such death, injury or damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated.

Third, the perpetrator knows that,

[T]he attack would cause incidental death or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment and that such death, injury or damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated.

⁷ Elements of Crimes, no date.

Fourth, the conduct (i.e. the potential crime) is closely interlinked to an international armed conflict. Finally, the perpetrator is 'aware of factual circumstances that established the existence of an armed conflict'.

In addition to war crimes, the Rome Statute touches on environmental damage as an element of genocide (Article 6 [c]). Carrying out an activity 'deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part' may also involve the significant destruction of the environment, thereby invoking reference to the crime of genocide according to Article 6, point (c) of the Rome Statute. Genocide as defined by the Rome Statute, may include acts with the intent to destroy a national, ethnic, racial, or religious group, which could involve environmental destruction as a means of achieving this goal.⁸

Similarly, based on Article 7 point (k) of the Rome Statute, environment-related crimes can theoretically take the form of crimes against humanity, that is, as inhumane acts of a similar character that intentionally cause 'great suffering, or serious injury to body or to mental or physical health'. The activities behind crimes against humanity can constitute acts causing extensive environmental harm, leading to the displacement of populations and the destruction of livelihoods.

Therefore, the following question arises: Does the Rome Statute implicitly include environmental crimes? In a nutshell, the clear legal answer is no, as international criminal law requires normative clarity in terms of threshold, causal nexus, and culpability.⁹ These concerns cannot be assuaged through the vague notions mentioned above and merely potential (and by no means certain) impacts.

This raises a further question: If the Rome Statute is relatively silent on environmental crimes, what about other regimes of international lawmaking? The following subsections answer this question.

3.2. Protection of the Environment/Prohibition of the Destruction of the Environment in Other Treaties

There are several widely and even globally ratified and binding international treaties prohibiting activities that severely endanger the environment or cause serious environmental harm. However, this does not necessarily mean that these activities can be considered international crimes by the same legal provision.

Although the history of international environmental law is remarkably brief, having originated with the 1972 Stockholm world summit, the quality and condition

8 It is worth mentioning that in the Al-Bashir case, Al-Bashir was charged with (but not convicted of) genocide under Article 6(c) of the Rome Statute for ordering the deliberate destruction and poisoning of water sources.

9 However, another position is also conceivable given that the mentioned provisions of the Statute are relatively precise, whereby a person commits a crime if they intentionally launch an attack knowing that the attack will cause widespread, lasting, and serious damage to the natural environment. Such wording can form the statutory definition of a criminal offence in a Criminal Code.

of the environment was already being brought to the attention of the States amid earlier efforts to create laws to regulate warfare.

The Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (1925) declared the prohibition of 'the use of bacteriological methods of warfare and agree to be bound as between themselves'. Although clearly not an environmental-focused norm, as it focused on human health, it reflected the necessary restrictions of the use of almost unlimited armed violence in interstate relations.

Decades later, the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (BTWC) (1972) prescribed the observation of all necessary safety precautions for the protection of the population and the environment against all agents, toxins, weapons, equipment, and means of delivery specified the convention itself. Regarding the specific concerns, the UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention) (1972) includes Article 7, in which the contracting parties, namely, the States, agreed to the international protection of the world's cultural and natural heritage through international co-operation and assistance in order to conserve and identify that heritage.

Thereafter, the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and On Their Destruction (1993) placed the highest priority on ensuring the safety of people and protecting the environment. Meanwhile, in the 2008 Convention on Cluster Munitions, the States undertook to ensure that destruction methods comply with applicable international standards for protecting public health and the environment.

However, the importance of these treaties cannot be compared to the significance of the UN Convention on the Prohibition of Military or Any Other Use of Environmental Modification Techniques (hereinafter, ENMOD), which was adopted in 1976. Signed under the auspices of the UN, this legal measure is a cornerstone of environmental protection during armed conflicts. The basic philosophy of the ENMOD holds that States will refrain from engaging in military or any other hostile use of environmental modification techniques with widespread, long-lasting, or severe effects (Article I). According to Article 2 of the ENMOD, the 'term "environmental modification techniques" refers to any technique for changing—through the deliberate manipulation of natural processes—the dynamics, composition or structure of the Earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space'.

A year later, having witnessed several seriously detrimental and devastating methods of warfare (e.g. the use of gas, napalming of rainforests, and the nuclear weapon arms race), several members of the international community adopted two additional protocols to the 1949 Geneva Conventions.

Regarding the general norms of military and humanitarian law, reference should be made first and foremost to Additional Protocol I to the Geneva Conventions of 1949

(protection of victims of international armed conflicts).¹⁰ In this respect, based on expert opinions and treaty provisions as well as State practice, the customary nature of humanitarian law is reflected by customary international humanitarian law.

According to the Fourth Geneva Convention of 1949,¹¹ included Article 53,

[A]ny destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or co-operative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.

The 1949 State-based legislative objectives were cautious towards environmental damage. In the 1977 Protocols, crafted some 28 years later, States made greater efforts to include the destruction of the environment in the extended treaty regime. The Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) highlights the environmental aspects in international humanitarian law regime. The general prohibition of employing methods or means of warfare causing or potentially causing widespread, long-term, and severe damage to the natural environment stems from the basic rules of Protocol I (Article 35). However, the gravity of environmental protection within international humanitarian law stems from Article 55, which reads:

[C]are shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.

The second additional protocol—Additional Protocol to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)—has also been adopted for the protection of victims of non-international armed conflicts. It mirrors Protocol I's rules regarding the protection of objects (foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations, and supplies and irrigation works) indispensable to the survival of the civilian population (Article 14), as well as the protection of works and installations containing dangerous forces (Article 15).

In short, while the protection of environment in international criminal and humanitarian law is formulated in binding international treaties, there remains a marked lack of detailed rules.

10 Additional Protocols I and II to the Conventions for the Protection of Victims of War, concluded at Geneva on 12 August 1949.

11 Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (Geneva Convention IV).

3.3. Protection of the Environment/Prohibition of the Destruction of the Environment in Customary International Law and Other Non-Binding Documents

Broadly speaking, regulation of the protection of the environment does not have a long history in international law. The first general international environmental, albeit non-binding, document was the 1972 Stockholm Declaration on Human Environment. According to this globally accepted soft law declaration,

States have the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction (Principle 21).

States are responsible for ensuring that activities within their jurisdiction and control do not cause damage to the space of other States or outside the limits of State jurisdiction. This was maintained in Principle 2 of the 1992 Rio Declaration on Environment and Development, which almost repeats the exact wording of the Stockholm Declaration adopted two decades before. In this respect, a crucial field was the avoidance of warfare using environmentally detrimental weapons and methods. The application of international humanitarian law rules to environmental warfare shall, of course, also be applicable to any State territories and other territories beyond any States' jurisdiction.¹²

Nonetheless, the most extended and detailed reference on environmental "crimes" or international crimes involving the destruction of the environment appeared in the customary international and soft law documents, as well as the NGO-based materials.

First, the International Committee of the Red Cross (ICRC) published an important manual (of a customary nature) on the rules of armed conflicts, compiling the most detailed and elaborated collection and database of laws, customary norms, and State practices.¹³

In terms of global recognition, the UN General Assembly adopted Resolution 47/37 on the protection of the environment in times of armed conflict before passing important legislation in the late 1990s and early 2000s. Although a recommendation by legal standards, UN General Assembly Resolution 47/37 urged Member States to take all measures necessary to ensure compliance with existing international law applicable to the protection of the environment in times of armed conflict by ratifying and incorporating the relevant provisions of such law. It also encouraged the UN Secretary-General to invite the ICRC to report on both its own activities and those of other relevant bodies with regard to the protection of the environment in times of armed conflict.

¹² Henckaerts and Doswald-Back, 2009, pp. 143–158.

¹³ 26th International Conference of the Red Cross and Red Crescent, 1996, p. 58.

On account of the relevant treaties and international custom accepted and followed by States, as well as the relevant domestic legal measures and State practices (especially State military manuals), there is a widescale and accurate compilation of international humanitarian rules,¹⁴ some of which are closely linked to the protection of the environment. According to Rule 9, the definition of civilian objects includes the natural environment as well. Furthermore, Rules 14 and 15 (proportionality and precautions in attack) underscores respect for the environment in military attacks, while Rules 42 and 43 focus on the special protection of the environment in the case of attacks on works and installations containing dangerous forces as well as the need for the application of the general principles on the conduct of hostilities to the natural environment. Rules 44 and 45 are of the utmost importance within the given field. The customary nature of Rule 44 emphasises due regard for the natural environment in military operations. According to this specific rule, the methods and means of warfare must be conducted with due regard to the protection and preservation of the natural environment by taking all feasible precautions to avoid and minimise damage to the environment. Additionally, behaviour in armed conflict causing severe and widespread damage to the environment is to be condemned.

Adding to the requirement of “due regard” stipulated in Rule 44, Rule 45 (causing serious damage) forbids the destruction of the natural environment by the causing of serious damage as a weapon in military conflicts. Additionally, Rule 147 prohibits reprisal against the natural environment.¹⁵

In terms of the newest and most topical initiatives and customary-based documents, the 2020 Guidelines on the Protection of the Natural Environment in Armed Conflict (hereinafter, 2020 Guidelines) and the 2022 Draft Principles on Protection of the Environment in Relation to Armed Conflicts (International Law Commission) must be highlighted. The ICRC adopted the 2020 Guidelines as a non-binding collection of rules (of a customary law nature at most) based on existing binding treaty provisions and customs accepted by the States and in domestic State practice. The rules included in the 2020 Guidelines reflect due regard for the natural environment in military operations; the prohibition of widespread, long-term, and severe damage to the natural environment; the prohibition of using the destruction of the natural environment as a weapon; and the prohibition of attacking the natural environment by way of reprisal (i.e. Rules 1–4).

Beyond the relevant rules within international treaties mirrored in the customary rules of humanitarian international law and the previously mentioned 2020 Guidelines, the International Law Commission (ILC) completed the long overdue task of adopting the Draft Principles on Protection of the Environment in Relation to Armed Conflicts in 2022. Having fulfilled its mandate and competence, the ILC prepared the customary law aspects of the topic and recommended the progressive development

14 Henckaerts and Doswald-Back, 2009.

15 Henckaerts and Doswald-Back, 2009.

of international law on this topic. These non-binding draft principles, which have since been added to the agenda of the UN General Assembly and Member State governments, contribute to the topic by adding requirements for the prevention, notification, mitigation, remedy of harm, and assistance in the case of damage to the environment. General obligations to the States include striving for the sustainable use of natural resources, designation of areas of environmental importance as protected zones in the event of an armed conflict, and exploring the specific protection of the environment of indigenous peoples.

Among the draft principles, some are worth further attention. Regarding the so-called *Martens Clause*,¹⁶ with respect to the protection of the environment in relation to armed conflicts, the ILC asserts that, ‘in cases not covered by international agreements, the environment remains under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience’.

Principle 13 establishes three essential elements with respect to the protection of the environment during armed conflicts. First, the natural environment shall be respected and protected in accordance with applicable international law based on treaties and international custom accepted by the States. Second, care shall be taken to protect the environment against widespread, long-term, and severe damage; and the use of methods and means of warfare that are intended, or may be expected, to cause widespread, long-term, and severe damage to the environment is prohibited. Third, no part of the environment may be attacked, unless it has become a military objective. This third element can trigger dispute as decisions regarding “military objectives” fall within the margin of discretion and broad decision-making competence of the States or State, including that launching an attack. Such uncertainty complicates the uniform interpretation of the application of this specific principle.

Furthermore, mirroring the primary cornerstone of the ENMOD, Principle 17 emphasises that, ‘environmental modification techniques States shall not engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State’.

These rules thus include a number of exceptions to the prohibition. Nonetheless, the rules of law of armed conflicts and international humanitarian law shall be applied in cases where these exceptions emerge.

16 Ticehurst, 2010.

4. Conclusion

As this article has shown, there are not clearly articulated norms prohibiting ecocide, as the term “ecocide” is not defined normatively in international binding measures. That said, the destruction of the environment can be a war crime if the widespread and serious detrimental effects on the environment directly impact individuals. For the potentially and only theoretically existing “fifth crime” of ecocide, it should be noted that this term remains bound to the legal literature at present. As discussed above, while the definition of the term is a promising step, the chance of this NGO-based term and definition being implemented are negligible. Consequently, the victimisation of the environment (under the form of ecocide) is not subject to international criminal law, and the chances of it being so are extremely low, if not zero.

Furthermore, serious problems within international environmental norms are also appearing within the field of international criminal law. For instance, the lack of clear and widely accepted rules on causality, culpability, or threshold hinders efficient legal norms and solutions. As the best-case scenario, the abovementioned ‘Martens Clause for the environment’ may help in resolving some of these problems. However, in international criminal law, a vague, abstract, and literature-based Martens Clause-like solution is insufficient to label the activities or omission thereof of individuals or groups of individuals as crimes. The inherent problems and shortages typical of international criminal and humanitarian law (i.e. lack of important ratifying States, and unclear and vague provisions) remain obstacles in the protection of the environment. Compounding matters, the term “military necessity” (the source of which is mainly the state practice) is rather vague and voluntarily permissible by the States themselves.

The Rome Statute touches on the environment under the aegis of war crimes (Article 8 [2] [iv]), and there are several binding treaties and guidelines or draft documents dealing with the protection of the environment during armed conflicts. There is also a clear and growing trend in international lawmaking, including the phase of preliminary document drafting, that the environment should be included in the gravity of lawmaking as a protected object, an element with rights, and within the more precise scope of human–environment connection. Furthermore, the recent 2020 Guidelines and 2022 ILC Draft Principles may have enduring impact on the development of more diligent efforts in environmental law- and policy-making. In sum, on the short-term horizon lies the potential for legal and political shifts able to transform the protection of the environment into a more efficient regime.

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THE PROTECTION OF CULTURAL HERITAGE AND THE ICC: THE GAP BETWEEN ASPIRATIONS AND REALITY OVER 25 YEARS



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Abstract

This chapter explores the challenges and limitations faced by the International Criminal Court (ICC) in protecting cultural heritage over the past 25 years. While the ICC has established legal frameworks to prosecute crimes against cultural property, its effectiveness is hampered by jurisdictional constraints, political interference, and the lack of a comprehensive mandate for addressing art crimes. Cultural heritage is highlighted as a cornerstone of societal identity, with its destruction constituting an assault on humanity's shared legacy. This chapter critically engages with Schabas's analysis of the Al Mahdi case, questioning the ICC's interpretation of legal definitions and the broader implications for justice. Furthermore, it highlights how the principle of military necessity is often exploited as a loophole to circumvent international law and justify the destruction of cultural property. This chapter concludes with a call for international collaboration and generational leadership to ensure the preservation of cultural heritage as a global priority.

Keywords: Cultural heritage, Rome Statute, art crimes, jurisdiction, military necessity loophole, cultural genocide

1. Introduction

At the heart of the global pursuit of justice stands the International Criminal Court (ICC) in The Hague, a symbol of international law's fight against grave injustices. Tasked with prosecuting individuals for heinous acts that shock the conscience of humanity, including genocide, war crimes, and crimes against humanity, the ICC was established with lofty ideals. It has had to navigate a sea of operational challenges that significantly hinder its effectiveness. Key among these challenges is the Court's jurisdictional reach, which is confined only to the signatories of the Rome Statute. This limitation creates a glaring blind spot in the global justice system, as powerful nations like the United States, China, and Russia stand outside its jurisdiction, leaving significant geopolitical areas untouched by the ICC's authority. This gap not only hampers the Court's reach but also raises questions about the uniform application of international justice. The ICC's credibility is further complicated by perceptions of its susceptibility to political influence. Accusations of bias and selective prosecution, especially from entities like the African Union, which criticises the Court's disproportionate focus on African nations, have cast a shadow over its claimed impartiality.¹ The perception of the ICC as a political tool rather than a neutral arbiter of justice undermines its legitimacy, particularly among those who view it as meddling in state sovereignty. The lack of an enforcement arm is another significant obstacle. Dependent on Member States for executing its verdicts, the ICC faces inconsistent co-operation, often influenced by political considerations.² This reliance highlights the Court's vulnerability and the impact of geopolitical dynamics on the execution of justice, as seen in the difficulties in arresting figures like Sudanese President Omar al-Bashir.³ Additionally, the ICC grapples with legal and political debates over the definition and categorisation of crimes within its mandate. Disputes over the interpretation of crimes, such as the crime of aggression, introduce yet another layer of complexity to the ICC's function, affecting its ability to prosecute effectively. Amidst these myriad challenges, this chapter emphasises the fundamental value of cultural heritage as a pillar of societal identity. It argues that attacks on cultural heritage are assaults on both specific communities and the broader international community. These crimes often strike at the core of what it means to be human, erasing critical chapters of human history and artistic legacy. This chapter challenges the traditional view of art crime,⁴ often sidelined in discussions

1 Schneider, 2020, p. 90–109.

2 Akande & Tzanakopoulos, 2018, p. 939–959.

3 Duursma & Müller, 2019, p. 890–907.

4 For clarity, particularly for readers unfamiliar with international criminal law, it is essential to explain that “art crime” encompasses a wide range of illegal activities targeting cultural artefacts, including theft, smuggling, forgery, and deliberate destruction. It can be perpetrated by individuals acting for personal gain or as a calculated element of state policy. Motivations vary. Political motives are exemplified by the Nazis' systematic looting of art during World War II, ideological motives are evident in ISIS's destruction of ancient sites in Iraq and Syria, economic motives underpinned

of war crimes. It argues that national identities are violated when priceless and irreplaceable treasures of art and history are stolen or destroyed. Claims of non-jurisdiction, countering terrorism operations, and military necessity are some of the main excuses used to avoid criminal liability examined in this chapter. In doing so, this chapter calls for greater ratification and urges powerful nations like the United States to help build a more varied and comprehensive legal framework for the ICC. It also suggests updating the Rome Statute to incorporate “art crimes” and adjust to the evolving global situation. This chapter encourages readers to think on these issues by highlighting the ever-changing nature of international law and the critical need to protect our shared human history.

2. The Value of Cultural Heritage

Why does cultural heritage hold such immense value? This question is at the very core of our communities and identities. Cultural legacy goes beyond mere artefacts. An essential component of our shared human narrative, it is a rich tapestry of art, history, and inherent worth. In the realm of international law, particularly in the UNESCO conventions, cultural heritage comprises a wide array of elements, each possessing unique significance. These definitions in international law are crafted to be clear and precise – avoiding metaphysical or nebulous interpretations and focusing instead on concrete features of cultural heritage. Across various international legal documents, a consistent theme emerges: the recognition of an item as part of cultural heritage is anchored in its inherent value. This worth is not defined by monetary value alone. It concerns the material importance, historical significance, or artistic merit of the object in relation to the grand narrative of human civilisation. When thinking about a nation’s cultural heritage, it is easily apparent that it includes more than just historical practices and spiritual beliefs. It encompasses the material works of art, technological innovations, marvels of architecture, and long-lasting institutions. Passed down over many generations, these tangible artefacts serve as the bedrock upon which a community builds its identity and the stories that shape its political, social, and cultural landscape.

However, the idea of cultural legacy must be differentiated from cultural creation itself. Although they serve distinct purposes in our communities, both are essential. Cultural artefacts, both tangible and intangible, are priceless because of the strength they bring to a community. They are not merely outcomes of cultural

the widespread smuggling of antiquities from conflict zones, psychological factors drove instances like the vandalism of Michelangelo’s *Pietà* by a mentally unstable individual in 1972, and mercantile motives can be seen in the black-market trade of stolen works, such as the unresolved thefts from Boston’s Isabella Stewart Gardner Museum in 1990.

activities. They embody deeper notions like nationhood, patriotism, and shared historical experiences. Artefacts of cultural heritage, from centuries-old manuscripts to ancient buildings, tell a tale about human civilisations and their past and present. Essentially, cultural heritage is more than the sum of its parts. It is a living, breathing testament to the multitude of human cultures and the richness and diversity of those cultures. It reflects of who we are as a culture, where we have come from, and the things that we hold dear. Therefore, it is essential to comprehend and maintain this legacy, not just for sentimental reasons but also for the progressive development and enhancement of our international society. Consider, for instance, a piece of literature in a language unknown to a reader; to that reader, it is just a physical object with no inherent meaning. However, in the hands of someone who understands the language and context, it transforms into a vessel of cultural identity and historical continuity. The significance of cultural heritage is brought to light by this transformation. Heritage preservation is about more than just keeping things from the past – it is about protecting the core of what it means to be human.

Consequently, there is no question that an assault on the cultural identity of a particular group may be evaluated with the same level of seriousness as an assault on the lives of this group, as demonstrated by the Second World War. The devastating impact of cultural genocide is vividly illustrated by the policies of Nazi Germany, which ruthlessly targeted the cultural heritage of those deemed inferior. In 'Axis Rule in Occupied Europe', Raphael Lemkin highlighted the multifaceted nature of genocide, emphasising how the Nazis systematically suppressed native languages and imposed their own culture through education and the rigid control of artistic expression.⁵ The destruction and looting of monuments, museums, and galleries under Nazi occupation were not mere acts of war, but part of a deliberate effort to erase the cultural identity of conquered peoples.

However, the end of the Second World War did not mark the end of cultural genocide. The early twenty-first century has witnessed similar patterns, where cultural erasure precedes and often accompanies physical violence. The main motivations for attacking cultural heritage during armed conflicts include conflict goals, where cultural property symbolises the identity or memory of the opposing group. Military strategy reasons involve targeting heritage sites for tactical advantages in a conflict. Additionally, such attacks may serve as demonstrations of strength or commitment, or due to economic incentives, such as looting to fund military operations.⁶ This phenomenon transcends the boundaries of non-state actors like ISIS, infamous for its ruthless annihilation of Christian communities and obliteration of diverse cultural heritage. It also extends to state actors, as seen in Turkey's aggressive policies against the Kurdish minority since the 1980s. In addition to targeting individuals under the guise of combating terrorism, Recep Erdoğan's regime has systematically sought to erase Kurdish cultural identity, extending its assault to the cultural realm.

5 Balakian, 2013, pp. 57–89.

6 Brosché, Legnér, Kreutz & Ijla, 2016, pp. 248–260.

The tragic bombing of the Hittite temple in Ain Dara in 2018, far removed from any legitimate military target, epitomises this policy.⁷ This act of destruction, carried out during Turkey's offensive against the YPG, was not just a military manoeuvre but an attack on the historical and cultural legacy of the region. The loss of this ancient sanctuary, a testament to humanity's long and diverse history, echoes the earlier destruction carried out in Palmyra and Mosul. These cities, once vibrant tapestries of human civilisation, have faced similar fates, with their irreplaceable monuments and artefacts reduced to rubble. The obliteration of Palmyra's temples and Mosul's historic Al-Nuri Mosque symbolises not just the loss of architectural wonders, but also the deliberate erasure of cultural and historical narratives.⁸

The continuous devastation of cultural assets in contemporary wars vividly illustrates its vulnerability. Representing our history, art, and identity, these places are remnants of the past and integral components of the multi-coloured fabric of human civilisation. The tremendous diversity that unites us as a species makes their protection more than just conservation. These feelings and emotions from around the world urge us to think about more profound and difficult topics. Does the global community truly comprehend the seriousness of these crises, or are these responses merely articulate but insubstantial displays of concern? Do our words and deeds concur regarding the safeguarding of the legacy that defines us? As the ICC commemorates its 25th anniversary, it is imperative to conduct a thorough assessment of its efficacy. Should the ICC's performance in protecting cultural assets be re-evaluated in light of this milestone? Have we reached a point where a serious reflection on its successes and shortcomings is not only beneficial but necessary? These issues challenge us to reflect on our common concerns and take action to safeguard the cultural foundations of our civilisation.

3. The ICC's Mandate and Cultural Heritage: Legal and Procedural Shortcomings

3.1 Overview of the ICC's legal framework regarding cultural heritage

The ICC's legal framework includes Articles 8(2)(b)(ix) and 8(2)(e)(iv), which protect certain types of cultural property in armed conflicts by prohibiting intentional attacks against buildings like those dedicated to religion, education, art, science, charitable purposes, and historic monuments. Although international law provides specific protection for cultural property, there are significant deficiencies in the existing legal framework, impeding the successful preservation of

⁷ Kowalczevska & Łubiński, 2022.

⁸ Munawar, 2017, pp. 33–48.

cultural assets, especially during armed situations. A major deficiency exists in the jurisdictional restrictions pertaining to non-international armed conflicts. Articles 8(2)(b)(ii) and (iv) of the Rome Statute pertain to international armed conflicts, but there are no corresponding provisions for non-international armed conflicts. The exclusion of this aspect is especially concerning considering the frequent and severe consequences of non-international conflicts on cultural property. The lack of explicit legal safeguards for such disputes constitutes a significant omission in the safeguarding of cultural property amidst internal conflicts and civil wars.⁹ Another obstacle arises within the realm of moveable cultural property. The existing framework of the Rome Statute presents challenges when it comes to prosecuting offences involving the damage or theft of portable cultural artefacts. This is particularly true in situations where cultural artefacts are confiscated or taken by one side of the conflict, not for individual gain but as a component of wider military endeavours.¹⁰ The complex nature of these circumstances creates difficulties in the application of current legal definitions and norms, resulting in an ambiguous zone regarding the safeguarding of transportable cultural assets in times of armed hostilities. Moreover, the lack of clarity in determining the exact criteria for identifying a military target introduces an additional level of intricacy to the safeguarding of cultural heritage sites. Thorough analysis of the legislative regulations is necessary to determine if a cultural heritage site may be classified as a military target. The lack of clarity on this matter adds complexity to the implementation of the law in circumstances of dispute. For example, a historical structure utilised as military barracks may be categorised as a cultural heritage site.¹¹ However, its military function complicates the distinction, rendering legal assessments and safeguards more difficult.

In exploring the ICC's legal framework regarding cultural heritage, an intriguing perspective emerges on the possibility of interpreting crimes against cultural heritage as crimes against humanity under Article 7 of the Rome Statute. Often, the destruction or damage to cultural heritage occurs within the broader context of an assault on civilian populations. Such acts may constitute a standalone crime against humanity or accompany other acts that collectively contribute to crimes against humanity, thereby adversely impacting cultural heritage. However, this interpretation is complicated by the stringent criteria that define a crime against

9 Shcherbina & Salmo, 2023.

10 These acts reflect the use of cultural property as a tool within larger strategies aimed at territorial control, ideological enforcement, or psychological warfare. For example, during the Baedeker Raids in 1942, German forces targeted British historic cities, aiming to demoralise the population by destroying symbols of cultural and historical significance. Similarly, during the Iraqi invasion of Kuwait in 1990, approximately 30,000 pieces of Islamic art were confiscated from Kuwait's National Museum as part of a broader strategy to assert dominance and control over the region. See: Brosché, Legnér, Kreutz & Ijla, 2016, *op. cit.*

11 Camerin, Camatti & Gastaldi, 2021, p. 782.

humanity.¹² For an act to be classified under this category, it must be part of a widespread or systematic attack knowingly directed against a civilian population. The act should not be isolated or sporadic, and the perpetrator must be aware of the broader context in which the act takes place.¹³ This high bar for classification poses significant interpretative challenges. Consider the case where a singular incident resulted in the destruction of a cultural site. While an intentional and substantial act may be noteworthy, it may not be considered a crime against humanity if it is not part of a broader, organised assault on a civilian population. This circumstance exposes a significant limitation in the ICC's authority: the incapacity to prosecute some offences against cultural heritage that, however severe, do not correspond to the precise categories of crimes against humanity. Therefore, while there is a theoretical basis for categorising certain acts against cultural heritage as crimes against humanity, the complexity of proving such a categorisation under the current legal framework presents considerable challenges. This requires a detailed analysis of the legal definitions and, potentially, a broadening or re-evaluation of these categories to effectively handle and prosecute offences committed against cultural heritage. This growth would enhance the safeguarding of cultural and historical heritage essential to the existence of human civilisation.

3.2. Key cases and precedents set by the ICC in cultural heritage protection

The Al Mahdi case, brought before the ICC, set a landmark precedent in international law, highlighting the protection of cultural heritage. Centred on Ahmad al-Faqi Al Mahdi, the case dealt with the intentional destruction of cultural and religious sites in Timbuktu, Mali, a UNESCO World Heritage site. Al Mahdi faced specific charges of war crimes for directing attacks against nine mausoleums and the Sidi Yahia mosque, marking the first instance where an individual was prosecuted for war crimes explicitly focused on cultural heritage. In a groundbreaking decision, Al Mahdi pleaded guilty, showing remorse for his actions. This led to a swift trial, culminating in September 2016 with his conviction and a nine-year prison sentence.¹⁴ The case sent a clear message from the ICC that the intentional destruction of cultural heritage constitutes a serious crime deserving of significant punishment.

However, in his powerful analysis of the ICC's legal interpretations and approaches, Schabas challenged the ICC's application of the term "attack" as used in the

12 It is worth noting that the ICTY has determined that the destruction or extensive damage to cultural heritage, if carried out with discriminatory intent, can qualify as persecution, a crime against humanity under Article 5(h) of its Statute. This is because such acts not only target physical structures but also aim to erase the identity, history, and dignity of a specific group, constituting severe discrimination. By recognising this, the ICTY underscores the profound impact of cultural destruction as a tool of persecution during armed conflicts. See: O'Keefe, 2010, pp. 339–392.

13 Ibid.

14 Schabas, 2017, p. 75.

Rome Statute to Al Mahdi's actions.¹⁵ In common language, the term "attack" often refers to a military operation that involves the use of weapons. This is not the case in Al Mahdi's actions, as he destroyed buildings using items not considered military weapons in a setting where there was no armed confrontation.¹⁶ Schabas stressed that the Rome Statute's definition of "attack" for crimes against humanity during peacetime may not correspond to conventional legal interpretations when applied to war crimes, such as in the case of Al Mahdi.¹⁷ Certainly, Schabas recognised the safeguarding provided to cultural artefacts according to international humanitarian law, both during and outside of armed conflicts. Nevertheless, he raised doubts over the proper application of the ICC's rules in Al Mahdi's case, indicating that the Court's interpretation may have gone beyond the ordinary concept of an "attack" according to humanitarian law.¹⁸ He further noted the distinction in the ICC's case law between offences related to the conduct of hostilities and those applicable to individuals and property under a party's control.¹⁹ The ICC's approach in the Al Mahdi case may have deviated from established legal norms, as indicated by this distinction, which may be traced back to the oldest legal instruments of armed conflict legislation. Schabas questioned the need for a distinct restriction on assaults against cultural property under the Rome Statute. He argued that this may be redundant, given the general prohibition against attacks on civilian objects, further questioning the ICC's interpretations and applications of its provisions in the Al Mahdi case.²⁰

This case raises a thought-provoking point in our discussion regarding the role of and challenges faced by the ICC. This prompts a significant but difficult question: Was Al Mahdi wrongfully convicted? The answer is not straightforward. Al Mahdi certainly committed the crimes and confessed to them, but Schabas' critique points to potential issues in the ICC's interpretation of its own statute. This predicament requires a deeper enquiry into the essence of law and justice: Should we strictly adhere to the letter of the law or embrace the spirit of the law? Must we blindly follow the text or should we use our discernment to find the meaning? In this respect, the case of Al Mahdi was demonstrative, serving a broader purpose for humanity. In the field of international law, it implies that actual application and experience may be just as important as academic understanding. It prompts us to contemplate whether rigidly adhering to the literal wording of legal legislation is always the optimal approach, or if there is space for interpretation and adjustment to the evolving reality of our world. In its own way, this case was a learning experience for the ICC and the global community, demonstrating that the pursuit of justice sometimes requires navigating the grey areas between the rigid text of the law and its dynamic interpretation.

15 Ibid.

16 Ibid.

17 Ibid.

18 Ibid.

19 Ibid.

20 Ibid.

4. Challenges in Enforcing Protection

In our journey through the complexities of international law and its enforcement, we are entering the murky waters where politics and legal principles intertwine, particularly within the realm of the ICC. This section illuminates a crucial paradox: the more prominent a nation's role on the global stage, the less likely it is to yield to the jurisdiction of international law, especially when it comes to criminal accountability. Nobody, individual or state, welcomes criminal accusations. However, when these claims reach a global scale, the consequences become far more important. Powerful nations, with their far-reaching influence and strategic interests, often exhibit a marked reluctance to submit themselves or their citizens to external legal scrutiny. The reticence to accept the authority of an international agency such as the ICC over their citizens, even when they are involved in serious crimes, goes beyond merely avoiding criticism of their domestic or foreign policy.

This hesitation is not only a question of pride or sovereignty. The situation involves an intricate interaction between geopolitical strategy, national interests, and the overall story of power dynamics in the international system. The ICC faces significant hurdles in carrying out its mandate under these circumstances. This section examines these challenges from three perspectives: the utilisation of military necessity and counterterrorism as rationales for devastation, the complex matters concerning jurisdiction and sovereignty, and the consequences of political influences and interventions, particularly from influential entities like the United States and NATO. Each of these areas poses unique challenges and factors that need to be considered, which is why upholding the ICC's mandate is frequently a difficult task. The resistance of powerful states to international legal proceedings underscores a critical question about the impartiality and universality of international law. Exploring these difficulties reveals the intricacies that impede the ICC in its goal to enforce human rights and safeguard cultural heritage worldwide.

4.1. Military necessity as justification for destruction

The concept of military necessity, often invoked in the realm of armed conflict, has significant implications for the protection of cultural property. The roots of this principle lie in the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.²¹ While aimed at safeguarding cultural heritage, the Convention includes provisions that allow for exceptions under the guise of military necessity. Article 4 of the Convention outlines the obligations to protect cultural property. It also introduces a critical loophole, with paragraphs 1 allowing for

21 Many of the provisions of the Hague Conventions were heavily influenced by the Lieber Code, drafted during the American Civil War. This foundational document introduced principles like the protection of cultural property and civilian assets during armed conflict, which became cornerstones of modern international humanitarian law.

derogation from these obligations if ‘military necessity imperatively requires such a waiver’.²² Here, the phrase “military necessity” provides a convenient escape clause that states can exploit to bypass the Convention’s protective measures. It creates a grey area where the destruction of cultural heritage can be justified under certain circumstances, which is concerning given the subjective nature of what constitutes a military necessity. Let us consider a few situations in which military necessity might justify the destruction of cultural property:

(i) Strategic advantage: A cultural site might be located in a strategically important area, such as high ground or a crucial crossroad, and controlling or destroying it could provide a significant military advantage.

(ii) Use by enemy forces: If a cultural site is being used by enemy forces as a shield, a base for operations, or for storing weapons, its destruction could be justified as a military necessity.

(iii) Preventing enemy surveillance: A historical monument or building could offer a vantage point for enemy surveillance. Destroying it might be seen as necessary to prevent the enemy from gathering intelligence.

(iv) Eliminating symbolic landmarks: Cultural sites often hold symbolic importance. Their destruction could serve to demoralise the enemy or undermine their cultural identity.²³

(v) Blocking enemy movements: Ruins of destroyed cultural sites might be used to block roads or paths, hindering enemy movement. Their destruction may thus be deemed a military necessity.

The critical issue here is the subjective interpretation of what constitutes a military necessity. It offers a convenient pretext for states to engage in the destruction of cultural heritage under the guise of military operations. This loophole not only undermines the spirit of the 1954 Hague Convention but also poses a severe threat to the preservation of global cultural heritage. It calls into question the balance between military objectives and the imperative to protect cultural landmarks, which are not merely structures but repositories of human history and identity. The flexible interpretation of military necessity thus becomes a topic of debate, often polarising legal and ethical discussions in the context of armed conflicts.

22 Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention: (1) The High Contracting Parties undertake to respect cultural property situated within their own territory as well as within the territory of other High Contracting Parties by refraining from any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict; and by refraining from any act of hostility, directed against such property. (2) The obligations mentioned in paragraph 1 of the present Article may be waived only in cases where military necessity imperatively requires such a waiver.

23 A powerful example of the symbolic importance of cultural sites lies in the destruction of the Bamiyan Buddhas in Afghanistan by the Taliban in 2001. Their destruction was a calculated act, aimed at erasing the region’s pre-Islamic heritage and demoralising those who valued the pluralistic identity of Afghan society.

4.2. *Issues of jurisdiction and sovereignty*

The issue of jurisdiction and sovereignty presents a significant challenge in the enforcement of the Rome Statute. Currently, 124 countries are party to the Statute, including 41 from Europe, 33 from Africa, 29 from Latin America and the Caribbean, and 21 from Asia and Oceania.²⁴ Notably absent from this list are major global players such as the United States, Russia, China, India, Turkey, and Israel. Their reluctance to join the Rome Statute is a considerable detriment to global justice and human rights protection. Other factors contribute to their negative attitude towards the ICC, the most crucial of which include the following:

(i) Perceived threat to national sovereignty: The United States has long held concerns about the ICC's potential to infringe on its sovereignty, particularly in cases where American soldiers could be prosecuted for actions in conflicts abroad. For instance, the US invasion of Iraq in 2003, which led to numerous allegations of war crimes, is a scenario where the US would strongly oppose external judicial intervention, viewing it as an infringement on its sovereign decision-making.²⁵

(ii) Political and military implications: Russia's military actions in Ukraine and Syria have been contentious, with allegations of war crimes. Russia's concern is that ICC membership could lead to legal actions against its military leaders or even political figures, impacting its ability to conduct foreign policy and military operations as it sees fit.²⁶

(iii) Divergent legal systems and practices: China's treatment of the Uighur population in Xinjiang, including allegations of human rights violations and cultural suppression, exemplifies a situation where China would resist ICC jurisdiction.²⁷ China's legal system, which emphasises state sovereignty and non-interference, contrasts with the ICC's principles, making ICC membership unattractive to Chinese authorities.²⁸

(iv) Fear of politicisation and bias: Turkey's ongoing conflict with the Kurdish population, including military operations in Kurdish regions and allegations of human rights abuses, highlights its concerns about potential ICC scrutiny.²⁹ Turkey might view the ICC as a tool that could be used against it politically, particularly by Western powers, in matters it considers to be internal or related to national security.

(v) Historical and cultural factors: Israel's longstanding conflict with Palestine, including military actions in Gaza and the West Bank, raises concerns about ICC intervention. Israel might see the ICC as a platform for political attacks against its

24 The States Parties to the Rome Statute, International Criminal Court. [online] Available at: <https://asp.icc-cpi.int/states-parties> [Accessed 27 Jan. 2024].

25 Wind, 2009, pp. 83–108.

26 Skuratova, 2016, pp. 125–137.

27 Aulya, Arifin & Smith, 2023, pp. 95–122.

28 Ibid.

29 Setiawati & Naranta, 2022, pp. 14–43.

policies and actions, influenced by international pressure and bias, rather than an impartial judicial body.³⁰

Examining the reasons behind some nations' hesitancy to join the ICC reveals a tapestry of historical, cultural, and political factors that shape their perspectives. Could this reluctance be more deeply entrenched in the mindset of a certain generation? The leaders of these nations, many of whom were shaped by the era of the Cold War and a world starkly divided along political lines, often prioritise national interests over international collaboration. They view ICC membership as a potential threat, fearing sovereignty infringement, political backlash, legal clashes, and biased prosecution, all against the backdrop of delicate historical and cultural contexts. As such, it is worth considering if a change in leadership from one generation to another might result in a distinct perspective. In countries like the United States, Russia, China, India, Turkey, and Israel, the current political elite grew up in a time when national interests trumped global co-operation. But what if the reins were handed over to the millennials, a generation with a markedly different mindset? Millennials, who are often perceived as more globally minded and interconnected, might view the role of international law and the ICC through a different lens. They could see ICC membership not as a surrender of sovereignty, but a commitment to a shared global heritage and a step towards a more collaborative international community. This raises other thought-provoking questions: Is the resistance to the ICC a relic of past geopolitical divides? Could a shift in leadership across these nations facilitate a more collaborative stance towards international law and justice? As a new generation takes the helm, will millennials question established norms and instead prioritise a more global perspective that strikes a balance between national and international interests? The answers to these questions might lie in the changing dynamics of global politics and the steady change in generational viewpoints, potentially marking the beginning of a new era in global relations and the pursuit of justice.

4.3. Political influences and NATO membership

The 2018 military activities carried out by Turkey in Afrin (Syria) serve as a prime example of how political influences and the oft-mentioned narrative of the fight against terrorism intersect within the framework of international law and the preservation of cultural property. The Turkish government's formal stance, as conveyed to the United Nations, rationalised the bombing of Afrin—which led to more than 2,200 fatalities and the devastation of Mesopotamian temples recognised by UNESCO as World Heritage Sites—as a defensive measure against Kurdish terrorist groups that posed a direct threat to its national security.³¹ This rationale raises critical questions about the selective application of the military necessity doctrine. Turkey is unlikely to use the justification of military necessity if there were terrorist threats

³⁰ Kuttat, 2023.

³¹ Khan, 2018, p. 77.

near important cultural monuments inside its own borders, such as the Hagia Sophia or the ruins of Troy, which have exceptional artistic and historical significance. The contrasting approaches—namely, the swift aerial attacks in Syrian Ain Dara versus the hypothetical cautiousness in Turkey—highlight a double standard in the application of military necessity. In Turkey’s rhetoric, this necessity seems to permit not just the destruction of ancient temples, but also the killing of civilians and other actions bearing the hallmarks of war crimes. NATO membership provides further evidence of Turkey’s impunity in this case, notably the absence of resistance from other NATO countries. Indeed, in his statement in April 2018, Jens Stoltenberg, Secretary General of NATO, praised Turkey’s role in the alliance, emphasising its contributions to NATO operations and the fight against Daesh.³² He acknowledged Turkey’s security challenges and reaffirmed NATO’s solidarity with Turkey.³³ This statement reflects the political complexities and strategic considerations that often influence the responses of international bodies and alliances to the actions of their Member States. In addition to illustrating the issues of military necessity and the fight against terrorism, the situation in Afrin exposes the intricate dynamics of political alliances and their impact on the enforcement of international norms, especially regarding cultural heritage protection.

4.4 Political influences and counterterrorism efforts

The situation in Israel and the Gaza Strip, particularly the events of 2023, serves as a critical case study in examining the intersection of political influences, military strategies, and the preservation of cultural heritage. During the conflict, significant historical and cultural sites in Gaza were destroyed, including the ancient Omari Grand Mosque, which was part of the city’s rich heritage.³⁴ UNESCO’s reports highlighted further destruction of cultural and historical objects in 2021, painting a bleak picture of the ongoing damage to Gaza’s cultural fabric.³⁵ In 2023 alone, nearly 200 historical sites of significance were destroyed or damaged by Israeli airstrikes in the Palestinian enclave. These included an ancient port dating back to 800 BCE, mosques housing rare manuscripts, one of the world’s oldest Christian monasteries, and the Rafah Museum, dedicated to the multi-layered heritage of the region.³⁶ Israel’s justification for these actions have centred on targeting Hamas, alleging that the group is operating in civilian areas, including hospitals and mosques. Of the 325

32 NATO (2018). *Joint press conference with NATO Secretary General Jens Stoltenberg and the Minister of Foreign Affairs of Turkey, Mevlüt Çavuşoğlu*. [online] NATO. Available at: https://www.nato.int/cps/ic/natohq/opinions_153695.htm?selectedLocale=en [Accessed 27 Jan. 2024]

33 Ibid.

34 Hussaini, 2024.

35 Unesco.org. (2024). *Gaza: UNESCO grants enhanced provisional protection to Saint Hilarion monastery*. [online] Available at: <https://www.unesco.org/en/articles/gaza-unesco-grants-enhanced-provisional-protection-saint-hilarion-monastery> [Accessed 27 Jan. 2024].

36 Ibid.

archaeological sites registered in the entire Gaza Strip, over 200 have been damaged or destroyed.³⁷ Spanning from the Phoenician and Roman eras to more recent times, these sites included ancient churches, mosques, museums, and other significant historical and archaeological landmarks.³⁸ For Palestinians, these places symbolise not just tangible constructions, but also encapsulate their historical legacy, cultural identity, and continued existence. In addition to being interpreted as an assault on the present and the future of Palestinians, the targeting of these sites is seen as an attempt to erase the past.

This situation raises critical questions regarding the accountability of nations not party to the Rome Statute, such as Israel, which does not recognise the ICC's jurisdiction. UNESCO's efforts to draw attention to the destruction in Gaza have frequently been met with accusations of bias from Israel, framing such concerns as "anti-Semitic" and "pro-Hamas".³⁹ This scenario underscores the challenges in fostering rational discourse when emotions and political narratives overshadow logic and the universal value of cultural heritage. The case of Israel and Gaza in 2023 exemplifies the complexities of protecting cultural heritage amid military conflict and political contention. It highlights the urgent need for a more effective international framework that can hold states accountable for the destruction of cultural heritage, irrespective of their political affiliations or stance towards international bodies like the ICC. The question remains: How can the global community navigate these deeply entrenched political and emotional barriers to ensure the preservation of our shared human history and cultural legacy?

5. Reimagining Justice: Integrating Art Crimes into ICC's Jurisdiction

In the contemporary world, the theft and destruction of cultural heritage pose equally grave threats, necessitating a critical re-evaluation and expansion of the Rome Statute to encompass "art crimes". The loss of a work of art, whether through destruction or theft, is not merely a loss to the nation from which it originates but a profound loss for humanity at large, depriving future generations of their cultural legacy. Article 8(2)(b)(xii) of the Rome Statute, which addresses the destruction or appropriation of enemy property, needs to be expanded to protect works of art from theft and destruction, recognising them as unique and invaluable. The significance of this amendment becomes evident when we recall the lessons of the Nuremberg Trials. In examining the activities of the *Einsatzstab Reichsleiter Rosenberg*, the Military

37 Ibid.

38 Ibid.

39 Corder and Casert 2024.

Tribunal at Nuremberg categorically rejected the notion that the appropriation of artworks was a preventive measure for their protection.⁴⁰ Evidence showed that the primary aim was the enrichment of the German nation and individual officers, not the preservation of cultural heritage.⁴¹ Today, the theft of cultural artefacts often results in their disappearance into the black market, making recovery nearly impossible. The expansion of the Rome Statute to include specific provisions for art crimes would address this issue. Such an amendment would also ensure that the theft and destruction of cultural heritage are recognised as war crimes, deserving of international scrutiny and action. It would not only bring justice to those who suffer from the loss of their cultural heritage but also preserve the shared heritage of humanity for future generations.

Broadening the definition of crimes against humanity to encompass the theft of artworks is an intriguing concept, one that could mark a transformative moment in international law. By considering the deliberate destruction or theft of a group's cultural heritage as parallel to its physical extermination, this expansion recognises the profound impact such acts have on the identity and survival of communities. The intentional targeting, theft, or obliteration of cultural objects could serve as a key indicator of a perpetrator's intent to erase a distinct cultural group. While this idea offers a ray of hope in filling a critical gap in international justice, practical challenges loom large, making its realisation a daunting task.

The first major hurdle is distinguishing deliberate acts of cultural destruction from the inevitable collateral damage in conflict zones. After all, in the fog of war, historical and cultural sites often suffer damage or destruction. Distinguishing such damage from a calculated assault on cultural identity demands unambiguous evidence. This challenge is exemplified in urban warfare scenarios, where cultural sites might be unintentionally harmed during military engagements. Second, proving that the theft or destruction of cultural property is part of a systematic attempt to annihilate a cultural group's identity can be complex. Unlike direct physical violence against individuals, the link between cultural theft and genocidal intent is less straightforward. For example, the looting of artefacts during a conflict might be driven by economic motives rather than an explicit intent to eradicate a community's cultural identity. Lastly, the willingness of states and international bodies to prosecute cultural theft as a crime against humanity depends on political and legal consensus. In cases where powerful nations or their allies are implicated, there might be reluctance or outright refusal to recognise cultural theft as part of a broader strategy of cultural genocide. This political dimension can significantly hinder the effective application of this expanded definition.

To summarise, incorporating the theft of cultural artefacts into the realm of crimes against humanity offers a path forward in addressing the profound impact of cultural heritage loss. While the practical challenges of implementation are

40 Roland, 2010.

41 Ibid.

significant, the potential for change lies in the hands of future generations. The millennial generation, along with emerging new leaders, carries the promise of ushering in this transformative shift. This is not a matter of ageism, but a recognition of the current reality: current leadership often exhibits reluctance towards such progressive changes. The new generation, with its fresh perspectives and commitment to global interconnectedness, holds the key to realising this vision. Shaped by a world that is more connected and culturally intertwined than ever, these future leaders may possess the necessary drive and vision to overcome the hurdles that currently impede the expansion of international law. Their approach could foster robust legal frameworks, establish clear evidentiary standards, and most importantly, cultivate the global political consensus essential for upholding and enforcing these laws.

6. Conclusion

As we reflect on the journey of the ICC over the past 25 years, it becomes evident that the Court, while established with the highest of aspirations, has faced significant challenges in fulfilling its mandate. The cultural heritage of humanity—an invaluable asset that binds us across time and space—remains under threat, often caught in the crosshairs of conflict and political agendas. The importance of preserving this heritage cannot be overstated. It is the tapestry of our shared human experience, rich in diversity and history. Regrettably, the ICC has struggled to prosecute those responsible for crimes against cultural heritage effectively. Instances from the fourth section of this chapter highlight how potential perpetrators have often remained beyond the reach of justice due to various factors. Jurisdictional limitations, political influences, and the challenges of addressing the nuances of art crimes have all played a part in this shortfall. These challenges underscore the pressing need for the Rome Statute to evolve in response to the realities of the modern world, including the consideration of enhancements to better protect cultural heritage. That said, there is real potential for change, particularly with the generational shift in leadership on the horizon. This transition is especially relevant for great powers like the United States of America and Russia, who have a long history of excellent legal academics, as demonstrated by their effective involvement in the Nuremberg Trials. A pressing question is whether the twenty-first century will see a comparable dedication to the safeguarding of cultural heritage and international justice. The next 25 years have the potential to be crucial. Should countries like the United States and Russia adopt the Rome Statute, it might signify the advent of a fresh epoch characterised by international collaboration and responsibility. This step would enhance the ICC's authority and further demonstrate the worldwide dedication to safeguarding our shared cultural heritage. The potential for this transformation rests with the upcoming generations of leaders, who, armed with new perspectives and a more globally networked mindset, might

serve as the driving force behind a revitalised and more efficient international legal system. In conclusion, the future of the ICC and the protection of cultural heritage hinges on our ability to adapt, innovate, and collaborate. The legacy of the past and the promise of the future converge at this critical juncture, presenting an opportunity for transformative change in the pursuit of justice and the preservation of our shared human heritage.

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CHAPTER 19

THE ICC AND CENTRAL EUROPE: WHY SHOULD WE CARE?



REBECCA LILLA HASSANOVA

Abstract

The following article explores the implications of the ICC and its Rome Statute on Central Europe, focusing particularly on Hungary, the Slovak Republic, the Czech Republic, and Germany. It examines the integration of the Rome Statute into national legal systems, highlighting both the operational challenges faced during its implementation and the varying degrees of compliance among the examined countries. Through a detailed analysis of Hungary's complex implementation issues, the Slovak Republic's smoother ratification process, the Czech Republic's legislative hesitations, and Germany's proactive approach, the study illustrates the multifaceted relationship between international and domestic law concerning international criminal justice. Central themes include the principle of complementarity, the treatment of high-ranking officials' immunity, and the successful incorporation of core international crimes into national legislation.

Keywords: Rome Statute, International Criminal Court, implementation, legislation, international criminal law

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1. Introduction

The advent of international criminal law changes the nature and atmosphere of international law as such on two levels. On the first level, international criminal justice brings, on the one hand, an element of mandatory judicial jurisdiction, which distinguishes it from the fundamentally optional nature of international justice in general. On the second level, it creates another level of responsibility for violations of the rules of international law, thereby affording the rules of international law a higher degree of protection. International criminal law, as part of public international law, can be directly enforced. The nature of responsibility is, however, different than in the broader international law, since the international responsibility regime generally aims to restore the original state, which can be tricky or even impossible to achieve in criminal matters.¹

The framework contains an individual substantive law establishing the circumstances of responsibility for committing a crime, as well as a procedural law providing supranational criminal courts with tools for prosecuting the perpetrators of those crimes. The establishment of such a system has many effects, many positive but others possibly adverse, such as the erosion of the principle of sovereignty in criminal matters.²

The Rome Statute, as with other similar statutes, establishes and governs the entire functioning of the International Criminal Court (ICC). All of its articles have an influence on the national laws of the countries which ratified the document. Some of these articles are clear, but others contribute to a confusion in matters of international criminal law. Its significance is evident in relation to the application of law, as the Rome Statute is the first item of international criminal legislation that expressly stipulates the sources of law which are to be applied by the Court.³

The criminal justice systems of Central European countries do not differ from each other in terms of basic principles. The main features follow the basic principles of the civic law system, which was established at the end of the 18th century.⁴ These systems most resemble those of the German, Austrian and other Central European states. When researching the impact of the ICC on Central Europe, one comes first to the question of the process of integrating the Rome Statute – which establishes the ICC – into the legal systems of these countries. This study focuses on this issue, as well as how the selected countries introduced the core crimes of the Statute into their domestic substantive law. The countries analysed are Hungary, the Slovak Republic, the Czech Republic and the Federal Republic of Germany.

1 Mareček, 2020, p. 94.

2 See Bartkó and Sántha, 2022, p. 300; Nagy, 2004, pp. 105–106; Nyitrai, M, 2006, pp. 16–20; Hollán, 2000, pp. 226–237.

3 Bitti, 2015, p. 411.

4 Vigh, 2000, pp. 135–148.

2. Implementation of the Rome Statute

The Court faced numerous challenges, both during its creation and subsequently in its operations, and political debates and actions by member states still have some impact on the Court's functioning. Even though the Court has a legal personality as an international body, its members aspire to influence it to a certain degree. In this matter, it is necessary to mention the Bernadotte dictum, stipulated in the advisory opinion of the ICJ case in the year 1949. The formula states that when the vast majority of the members of international community have the power, in conformity with international law, to create an international entity, it has to possess an objective international personality. In the case of the ICC, given that the Rome Statute was adopted by a vote of 120 to 7, with 21 abstentions, the first element (the support of the vast majority of the international community) has been fulfilled.⁵ The ICC therefore has the full capacity to act in situations of the most severe international crimes. Its jurisdiction is, however, based on the complementarity principle,⁶ and is therefore complementary to the national jurisdiction of the member states, allowing each state concerned to resolve and decide cases appropriately on its own.⁷

The principle of complementarity as a fundamental principle establishing the basic functioning system of the ICC takes the principle of state sovereignty into consideration. The criminal law is closely related to numerous values that countries share and accept, a link that may be even stronger and more significant in the countries of Central Europe. The core values of this region are reflected in the criminal justice system, which is one of the instruments by which state sovereignty is exercised. The principle of complementarity is a principle that aims to respect the sovereign power of its ratifying states to exercise criminal jurisdiction over their own citizens and their own territory. In addition, via this principle, the ICC reminds itself that states are in a better position to decide upon criminal matters happening within their own jurisdictions. National courts are established based upon the common values of the state and its citizens. Their knowledge of the relationships, mentality and national legislation, including the placement in the country, act as the foundation for quicker and more accurate decisions.⁸

Although the ICC through the Rome Statute claims not to intrude on the sovereign powers of the ratifying states, general acceptance of the Statute has not been easy, and different states have raised different arguments regarding inconsistencies in jurisdiction and applicable procedures. Recognition of the ICC's jurisdiction to prosecute significant crimes in the field still faces problems, such as the non-recognition

5 Even States which voted against the adoption of the Rome Statute acted during the Rome Diplomatic Conference as promoters of establishing the Court. Those who voted against did so based on allegations of textual flaws or the lack of inclusion of certain crimes.

6 It means that the ICC has secondary jurisdiction after national courts, and can only act in a given situation if the relevant states are unwilling or unable to prosecute the crimes within their jurisdiction.

7 Kovacs, 2018, p. 228.

8 Mihes, 2022, p. 125.

of jurisdiction by major international states, such as the USA, China and Russia. On the other hand, individual member states of the European Union and the EU as a whole played a significant role in the creation and development of the Court. There are therefore various differences in the varying dimensions of support for the ICC in terms of geopolitics. These multiple differences in questions of support can be explained by a combination of factors, primarily international and political. Moreover, these differences have deepened over time, primarily due to interactions between the US and the EU during the creation and early development of the Court.⁹

“Implementation”, defined as the actual incorporation of international obligations at the domestic level by transforming international legal norms into national laws and regulations,¹⁰ means ensuring practical results and incorporating provisions through specific means into the domestic systems of the ratifying countries. This term has been reflected in many UN General Assembly resolutions, international conventions and other legal instruments.¹¹

The content of international criminal law is the criminalisation of specific acts and the attribution of individual criminal responsibility to their perpetrators. The implementation of war crimes and other international crimes into the domestic legislation of states can be achieved in several ways, as shown by how states have gone about this. This means that specific behaviours become criminal offences within each state’s criminal system, thereby becoming subject to criminal proceedings within the national systems of individual states.

Implementation can be achieved by a variety of means. The first approach consists of the application of already valid written or customary national criminal law and is based on crimes already regulated in national legislation (such as murder, torture, grievous bodily harm and other common crimes) that are closest to the conduct in question. Such an approach, quite common during trials that followed World War II, was and is still used in more recent cases involving international crimes.¹²

The second possibility is the criminalisation of serious violations of international humanitarian law through general reference to the treaties to which the state is a party, international law in general or, most often, to the laws and customs of war, followed by a definition of the range of punishments. This approach can be found in many criminal codes. It is relatively simple to adopt and can easily be applied to all serious violations of international law, including those occurring under customary law. In addition, no new legislation is required if the relevant legislation is amended accordingly. Custom, as an unwritten rule of conduct, continuously develops, so no special acceptance process is necessary when new duties arise. The same applies to

9 Groenleer, 2015, p. 923.

10 See Garner, 2014.

11 Shulzhenko, 2020, p. 530.

12 Ferdinandusse, 2006, p. 19.

the ratification of an international treaty when the state becomes a party to a newly drafted binding document.

The third option consists of the incorporation of a list of specific criminal acts into national law, a list that corresponds to the crimes listed in the relevant treaties of international criminal law – specifically the Rome Statute in the current situation. This can be achieved in various ways: by direct reference to specific articles of the statute; by rewriting the entire list of crimes into national law using the exact wording of the statute and adding only the appropriate sanctions applicable to each crime or category of crimes; or by incorporating each crime individually and reformulating it to better match the overall text of the relevant articles. Such a specific criminalisation approach would clearly prove a major task for any legislative body, requiring considerable efforts in terms of research and drafting, with the additional risk of substantial modifications to the definitions of offences that may have different meanings. This could, in turn, entail a major revision of existing criminal law legislation, making the process long and cumbersome. On the other hand, a factor that might recommend this approach would be the perceived opportunity for legislators to amend other unrelated parts of the code as well. Nevertheless, if criminalisation is too specific and detailed, it could lack the flexibility available within other options when adaptation to new developments in international law is needed.¹³

A fourth method of implementation can follow a mixed approach and achieve criminalisation through a generic reference to international criminal law combined with the explicit and specific inclusion of certain serious crimes (such as genocide) in criminal codes. States frequently used this method before the adoption of the Rome Statute, as it enables full fulfilment of the obligations arising from the treaty while retaining an appropriate differentiation of individual crimes. However, this solution could require judges to interpret both international and domestic law, with the possibility of conflicting provisions having to be taken into account.¹⁴

Finally, the introduction of international criminal law is also possible through the direct application of international law in domestic law without any explicit reference to the national legislation. This is usually made possible by the wording of codes and rules that legally define the relationship between national and international law, or the provisions of a constitution in which the provisions of international law are recognised as a source for the application of the provisions of international criminal law. Another possibility is to assign a universally superior role to international law over national law in the text of a state's constitution.

13 La Rosa and Chavez-Tafur, 2010, p. 712.

14 Chavez-Tafur, 2008, pp. 1061–1075.

3. Implementation in various Central European countries

Regarding the methods whereby the Rome Statute was implemented into the national systems of Central European countries, the author discovered different approaches,¹⁵ some of which are analysed below in terms of the similarities and differences in those approaches. The analysed countries illustrate examples of the impact of the establishment of the ICC and the implementation of the Rome Statute in Central Europe.

3.1. Hungary

The internal law of each state relates in some way to international legal norms. The relationship between international law and domestic law is a public law issue that has been dealt with in the constitutional development of the enforcement of international legal rules within the Hungarian state. Questions related to the procedure for implementing Hungary's international commitments have been ignored for decades. The Hungarian constitutional system regards international law as a separate legal system, the norms of which can only be enforced in the Hungarian legal system after a separate transformation. Hungary, therefore, applies a dualistic model to issues regarding the relationship of national and international law. In the light of the interpretation of the Constitution, called the Fundamental Law, by the Constitutional Court of Hungary, universal customary international law and the rules of international law requiring unconditional application, as well as the general legal principles recognised by the international community, are incorporated into the national system via a so-called "general transformation". International treaties, however, are implemented in Hungarian national law with a "special transformation".¹⁶

Nevertheless, a decision by the Hungarian Constitutional Court in 1998 stipulates that if a promulgated international treaty codifies a rule of international law that requires unconditional application, such a contractual commitment can be enforced even if it contains elements contrary to the Fundamental Law.¹⁷

Hungarian government representatives were present when the Rome Statute was created and accepted in 1998. In 1999, Hungary signed the treaty, and it was ratified by the Hungarian Parliament in 2001. In July 2002, the treaty gained binding force. However, the President has still not officially promulgated it, which means that Hungarian domestic law has not fully implemented the treaty. The barrier to completing the procedure is based on the arguments of the Office of the President, claiming that the Rome Statute gives rise to certain constitutional issues. Although the Hungarian

15 Hassanová, 2021, pp. 43–45.

16 Molnár, 2018, p. 1.

17 Hungarian Constitutional Court decision, N. 53/1993 (X.13).

academic community has regularly been vocal on this matter, progress in the near future seems unlikely.¹⁸

No official statement has been issued by the President's office regarding the reasons for not promulgating the treaty, but certain indications can be deduced from parliamentary discussions and documentation. These suggest that the main issue that concerns the President is the immunity clause, in particular its application to the head of state.¹⁹

Both the previous Hungarian Criminal Code and the Code of Criminal Procedure during their amendment procedures, and later the newly adopted law, included many implicit and explicit references to the ICC or an "international criminal court". However, Art. 13 of the Fundamental Law declares the functional immunity of the Hungarian President. It stipulates the conditions for his impeachment in cases of intentionally violating the Fundamental Law or a law in connection with the exercise of his office, or when committing an intentional crime. The impeachment procedure, which has never been implemented in Hungary, revolves around the idea of indignity, of becoming unworthy, in connection with the actions of a person who should have the highest moral character. This is therefore significant from the point of view of public trust.²⁰

Apart from failing to promulgate the treaty, Hungary also failed to ratify the additional resolution 6 from 2010; this inserted Art. 8 bis introducing the crime of aggression. This is also probably directly connected to the issue of the immunity of the head of state since the mandatory element of the crime states that responsibility for the crime is borne by a 'person in a position effectively to exercise control over or to direct the political or military action of a State'.²¹ The Fundamental Law states in Art. 9 that the President is the Commander-in-Chief of the Hungarian Armed Forces;²² however, according to the Constitutional Court's position, the status as commander is a constitutional status and does not constitute a rank or position in the Defence Forces or the Border Guards. The position is similar to that of a director and not a leader.²³

Taking the arguments mentioned and the possible application of law into account, the author considers the fear as unfounded and the reasoning as insufficient. First of all, even within the framework of a Hungarian special legal order, it is unlikely that the head of state, as a member of the National Defence Council, would take part in decisions to commit serious international crimes. Furthermore, there is very little possibility that the Hungarian President in his or her personal non-official

18 Kovács, 2019, p. 70.

19 The clash between the application of the Rome Statute and the issue of personal immunity is discussed later in the chapter.

20 Hungarian Fundamental Law, Art. 13, sec.1–2.

21 Rome Statute, Art. 8bis, Sec. 1.

22 Hungarian Fundamental Law, Art. 9, Sec. 2.

23 The mentioned decision was in connection with a taxi blockade, a protest against the gasoline price increase in Hungary in October 1990. Decision of the CC 48/1991. IX.26. point A/3 a).

capacity would take part in criminal actions. Regarding actions carried out before being elected, there is almost zero possibility that such a person would be able to conceal having taken part in crimes such as those stipulated in the Rome Statute. Still, if the contrary were to appear to be true, the Parliament can remove the head of state from office through impeachment.²⁴

Finally, to conclude the situation in Hungary, based on the correct legislative initiative of the creators of the Criminal Code, the majority of the elements in the Statute are already included in the texts of domestic laws in almost identical form. Art. 142 prohibits genocide, defining the act as intending the total or partial destruction of a national, ethnic, racial or religious group. The concrete methods of committing the crime are exactly the same as in the Statute and the sanction of imprisonment is set from ten to twenty years or life imprisonment. Art. 143 defines crimes against humanity in almost identical fashion to the definition set down in the Statute with only minor differences, such as the addition in the Hungarian law of human trafficking or forced labour as additional methods of committing the crime, or the inclusion of ‘acts causing serious physical or mental harm’ replacing the crime of torture. The sanction for perpetrating these acts is ten to twenty years of imprisonment.²⁵

Articles 146 to 157 stipulate the individual war crimes. Besides the crime of prohibited recruitment, ceasefire violation or violence against a representative of the enemy, numerous crimes under Art. 8 of the Statute are included in a separate prohibitive act. Examples include Art. 151 (crime of using living shields), which corresponds to the Statute’s Art. 8 section 2 b) ii); Art. 152 (crime of prohibited recruiting), which corresponds to Art. 8 section 2 a) v); and Art. 154 (war looting), linked to Art. 8 section 2 a) iv). Hungarian law also prohibits the following crimes: violence against protected persons, instructions to kill survivors, attacks on protected property, use of a weapon prohibited by international treaty, attacks on a humanitarian organisation or the misuse of a badge or sign protected by international law.²⁶

While there are no specific references to the crime of committing physical mutilation or forcibly carrying out medical or scientific experiments on persons in captivity,²⁷ it is possible to conclude that Hungarian law appropriately reflects the Rome Statute. Accordingly, the measures embodied in the Statute can be applied without further promulgation. Nonetheless, considering that there was no case concerning Hungary before the ICC, it would appropriate to promulgate the law before the issue of Hungary’s failure to do so becomes a subject of discussion in The Hague.

24 Kovács, 2019, p. 80.

25 Hungarian Criminal Code, n. 2012/C, Art. 142–143.

26 Hungarian Criminal Code, n. 2012/C, Art. 146–157.

27 Rome Statute, 2002, Art. 8, sec. 2. b) x).

3.2. *Slovak Republic*

The ratification process in the Slovak Republic was far less interesting than in Hungary. After approval by the Government of Slovakia, the National Council decided that the Rome Statute is an international treaty according to Art. 7 para. 5. of the Constitution and therefore has priority over domestic legislation. Ratification by the President took place on 8 April 2002, and since 1 July 2002, it has been legally binding. An additional entry into the Collection of Laws was made and the treaty itself became enforceable under no. 333/2002.

Nonetheless, some of the processes that took place in Slovakia prior to the ratification should be mentioned, including the many changes introduced in order to fulfil the ratification requirements. The Constitutional Court of the Slovak Republic, in its second report on the constitutional issues that arose in connection with the ratification of the Rome Statute, presented the content of comments on the issue and the reservations of other states.²⁸ This report clearly shows that Slovakia had no reservations when accepting the Rome Statute. In the framework of the public administration of the Permanent Mission of the Slovak Republic to the United Nations, there is also a report related to the implementation of the Rome Statute into the legal system of the Slovak Republic.²⁹ This report specifies what adjustments were made to create the legal framework before ratification. The amendments addressed selected issues, such as the inclusion of crimes against humanity, the expansion of the universal scope of the Criminal Code, and the definition of war, as well as the question of the responsibility of a military commander for the acts of subordinates.³⁰

The amendments to the Slovak Constitution, required to enable ratification of the Statute, were firstly drawn up in preparation for the application of the Convention on extradition between member states of the European Union by law n. 90/2001. In this context, the constitution changed the original wording of Art. 23 stipulating that ‘a citizen cannot be forced to leave his homeland, and he cannot be extradited to another country’ by erasing the final clause.³¹ Currently the appropriate term for such an action is to “surrender” the offender to the ICC, and the term “extraditing” is not used.

Substantive provisions of the Statute were introduced into the already existing legislation of the domestic legal order, that is, the Criminal Code of the Slovak Republic. The implementing legislation clarified and broadened the scope of substantive crimes

28 Addendum to the second report of the Slovak Constitutional Court on constitutional issues that arose in connection with the ratification of the Rome Statute of the International Criminal Court. SDL-INF(2001)001. adopted by the European Commission for Democracy through Law at its 76th plenary session. 2008.

29 Report of the Permanent Mission of the Slovak Republic to the United Nations New York. No. 223/2009-USSM/EC.

30 Ferenčíková, 2022, p. 207.

31 Constitutional Law of the Slovak Republic, n. 90/2001, which amends the law n. 460/1992. Art. 1. sec. 9.

through reference to the Statute. However, a remarkable number of the substantive provisions were incorporated into chosen provisions of the Criminal Code. These included the crime of Incitation, Defamation of and Threatening Persons by Reason of Race, Nation, Nationality, Colour of Skin, Ethnic Group or Origin under Art. 424, the act of apartheid under Art. 424a and crimes against humanity (described as the crime of “cruelty”) under Art. 425. For this crime, the article states that a perpetrator is one who carries out a large-scale or systematic attack directed against the civilian population using methods such as murder, extermination of people, enslavement, deportation or forced transfer of the population and torture. Although some subsections are in a different order, the text of the article is the same as Art. 7 of the Rome Statute. The scope of the sentence is set from twelve to twenty-five years or life imprisonment.³²

The crime of genocide is defined in Art. 418 as an act intended to destroy, in whole or in part, any nation or any national, ethnic, racial or religious group by any one of several means: a) causing serious injury or death to members of the group; b) implementing measures which prevent the birth of children to members of the group; c) forcibly transferring children from the group; or d) creating living conditions that are intended to lead to the complete or partial destruction of the group. The sanction for the act is set as imprisonment from fifteen to twenty years. The second section of the article prescribes the aggravated form of the act perpetrated during war or armed conflict.³³

Slovak criminal law had already recognised many war crimes, such as using prohibited means or illegal methods of engaging in combat, looting in an area of war operations, abuse of internationally recognised designations and state symbols, endangerment of cultural values or abuse of the right of requisition. After ratification, the law was supplemented by Art. 431 (defining the crime of “cruelty” in war) and Art. 432 (persecution of the population). The war crime of “cruelty” declares that whoever violates the regulations of international law during war through cruel treatment of the defenceless civilian population, refugees, wounded, members of the armed forces who have already laid down their arms or prisoners of war shall be punished by imprisonment for four to ten years. Under the article, failure to take effective measures to protect persons who need such help, especially children, women, the wounded or the elderly, is also prohibited, as well as preventing or hindering the civil protection organisations of an enemy, neutral or other state from fulfilling their humanitarian tasks.³⁴ The crime of persecution is defined as committing inhuman acts resulting from national, racial or ethnic discrimination or terrorising a defenceless civilian population by violence or the threat of its use.³⁵ Nev-

32 Ibid., Art. 425.

33 Slovak Criminal Code (Trestný zákon), n. 300/2005. Art. 418.

34 Ibid. Art. 431.

35 Slovak Criminal Code (Trestný zákon), n. 300/2005. Art. 432.

ertheless, after the implementation of the Rome Statute, the list of war crimes was further supplemented by Art. 433 on war crimes, where the text reads as follows:

*‘Whoever commits an act considered a war crime by Article 8 of the Rome Statute of the International Criminal Court shall be punished by imprisonment for twelve to twenty-five years or life imprisonment’.*³⁶

Ratification produced the need for new procedural provisions. The prerequisites to make possible the extradition of a citizen of the Slovak Republic for prosecution before the ICC were created by amendment of the Constitution in 2001 and amendment of both the Criminal Code (in 2002) and the Criminal Procedural Code. In relation to the Procedural Code, this meant the amendment of Art. 477, 478 and 480 of the fifth part devoted to the issue of legal relations with foreign states.³⁷ Art. 81 of the Law of the Enforcement of Prison Sentences concerning units with a safety regime was amended, to include the ability of the state to carry out sentences imposed by the ICC.³⁸ The law was replaced by a new one in 2008, but this action carried out prior to implementation proves the genuine intent of the Slovak government to amend the vast majority of rules related to criminal matters according to the terms and demands of the Rome Statute.

Pursuant to Article 7 par. 5 of the Constitution of the Slovak Republic, the Rome Statute directly establishes the rights and obligations of natural persons or legal entities and therefore takes precedence over the laws of the Slovak Republic, given that the Slovak Republic follows a monist legal approach whereby international law takes precedence over national law. The application of the Rome Statute within the legal system does not represent a significant problem. The only questions arise regarding the self-execution of the statute or its possible direct effect, namely in its application.³⁹ In addition, the issue of the immunity of officials, as set forth in Art. 27 of the Statute, was omitted since there is no explicit provision concerning the mentioned collision. Although Slovakia’s criminal law legislation has been further amended since then, the changes due to the adoption of the Rome Statute represented a significant shift as well as step forward for Slovak criminal law.

3.3. Czech Republic

The acceptance process in the Czech Republic can be seen as falling somewhere between the previous examples of Hungary and Slovakia. The Czech delegation was one of those that played an active role in advancing the negotiations during the

36 Ibid.

37 Report of the Permanent Mission of the Slovak Republic to the United Nations New York. No. 223/2009-USSM/EC.

38 Law of the Enforcement of Prison Sentence (Zákon o výkone trestu odňatia slobody) n. 475/2005, para. 81.

39 Šmigová, 2019, p. 89.

creation of the Statute, and their proposals were often in opposition to those of the U.S. The Czech representatives signed the treaty in 1999, but the Czech Parliament delayed its approval due to doubts as to whether the document was in accordance with the Czech constitutional order. Consequently, this meant that the Czech Republic was the last European Union state to ratify the treaty.⁴⁰

During the period when the Czech Republic was a party to the treaty but still had not ratified it, Czech scholars lobbied strongly for the process to be completed. Supporters claimed that the country was missing opportunities to participate in the operation and further development of the ICC. In addition, it could not refer to the ICC cases that in its opinion deserved attention and in which prosecutions should be instituted. Furthermore, the country's failure to ratify also directly influenced the composition of the Court.⁴¹

Parliament's multiple rejections of ratification were the result of concerns arising from other issues. Members of the Parliament were of that opinion that, in order to ratify the Statute, the Republic had to amend the Constitution in relation to the question of the immunity of its high officials, such as the head of state, members of Parliament or judges of the Constitutional Court. In addition, there were proposals to amend the competence of the president to grant amnesties, as well as the Czech Charter of Fundamental Rights and Freedoms in relation to the prohibition on forcing citizens to leave their country.⁴² However, these observations regarding the ratification of the Statute were based on the procedure envisaged by the then Art. 10 of the Constitution, which put international treaties on an equal footing with ordinary laws, not with the constitutional order of the Czech Republic.⁴³

The change was represented by the efforts to accede to the European Union and the amendment of the Constitution, which, among other things, introduced a new category of international treaties according to Art. 10a of the Constitution. The pertinent provision deals with the relationship between international and domestic law. It stipulates that 'some powers of the authorities of the Czech Republic may be transferred to an international organization or institution by an international treaty'. Therefore, in the proceedings on accession to the EU and its various treaties, the Parliament of the Czech Republic did not find it necessary to amend the Constitution and the constitutional order or to define how they were affected by EU law. As the Rome Statute is also an international treaty that transfers certain powers hitherto exercised by Czech authorities, the EU precedent meant there were no grounds for halting the ratification procedure.⁴⁴

Furthermore, on the basis of the analysis carried out by the Czech Ministry of Justice in the matter of the compliance of substantive criminal law with the so-called

40 Majerčík, 2003, p. 23.

41 Hamáček, 2008, p. 212.

42 The Czech Republic has a so-called constitutional order which includes the Constitution and the Charter of Fundamental Rights and Freedoms, which have the same legal force.

43 Červenková, 2007, p. 6.

44 Malenovský, 2007, p. 28.

substantive provisions of the ICC Statute, it is possible to state that the valid Czech substantive criminal law was, in principle, more or less consistent with the Statute.⁴⁵ Where Czech law did not provide certain provisions demanded by the Statute, revisions of the relevant norms were already underway in the legislative process.⁴⁶

Later on, in 2008, the Parliament agreed to ratification and the president, after some hesitation, signed the treaty on 8 July 2009. This strengthened the group of Central European states in the Assembly of the Contracting Parties and further contributed to reducing the risk that this group could be outvoted by Third World states in the Assembly. In addition, Czech citizens gained the right to apply for the positions of judges, and thus the activities of the Court could also be influenced by the Czech legal tradition, while, conversely, the jurisprudence of the Court could affect the legal order of the Czech Republic.⁴⁷

In matters relating to the implementation of the Statute's provisions on core crimes, the wording of the Czech Criminal Code is similar to that of the Slovak one. Art. 400 prohibits genocide as it is stated in the Statute, the sanction being imprisonment from twelve to twenty years. No special aggravated form is stipulated in the provision.⁴⁸ The following Art. 401 defines crimes against humanity as defined in Art. 7 in the Statute, with a sanction of twelve to twenty years or life imprisonment.⁴⁹

Part 2 of Chapter XIII, entitled 'crimes against humanity, crimes against peace and war crimes' is devoted to the topic of war crimes and crimes against peace.⁵⁰ The war crimes listed are the following: use of a prohibited means of combat and illegal conduct of combat (Art. 411), cruelty of war (Art. 412), persecution of the population (Art. 413), looting in an area of war operations (Art. 414), misuse of internationally recognised and national emblems (Art. 415), abuse of the flag and the truce (Art. 416) and harming enemy *parlementaires* (Art. 417). Some provisions specifically prohibit certain types of aggressive actions not included in the Rome Statute, such as Art. 411,⁵¹ which explicitly prohibits destroying or damaging a dam, nuclear power plant or similar facility containing dangerous forces. However, some crimes are omitted in the text of the Code, such as the prohibition of attacks on protected cultural property or on humanitarian organisations.⁵²

The legal framework accordingly implemented the necessary elements of crimes set by the establishing document of the ICC. Although some provisions in the Rome Statute are missing from the Czech substantive law, the Czech framework can be

45 Explanatory report of the Czech Ministry of Justice to the Act to amend certain laws in connection with the Criminal Code, 2009.

46 Křivánek, 2008, p. 183.

47 Bílková, 2007, p. 9.

48 Czech Criminal Code, n. 40/2009, Art. 400.

49 Czech Criminal Code, n. 40/2009, Art. 401.

50 The first provision defines the crime of aggression, while five later articles relate to crimes against peace. The articles dealing with the crime of aggression will be analysed later on in the chapter dealing with issues of actual and current cooperation.

51 Similarly, as in Art. 426 sec. 2 b) of the Slovak Criminal Code.

52 Czech Criminal Code, Art. 411–417.

judged to have effectively and appropriately reacted to the challenges arising from the country's prolonged ratification procedures.

3.4. Federal Republic of Germany

In an attempt to give a more complex overview of the issue of the implementation of the Rome Statute, the author presents the approach of a more Western but still Central European country. Germany, with its broadly influential legal tradition and strong Constitutional Court, has an impact on the perception of international law. Germany was preparing for the implementation of the Rome Statute from the moment of its creation: the Rome Statute was ratified on 10 December 1998 and German ratification took place almost exactly two years later, on 11 December 2000. Numerous implementation measures followed the ratification, with the Code of Crime against International Law and the Act on Cooperation with the ICC worthy of special mention. The acts implementing the Statute entered into force no later than the Rome Statute.⁵³

Interestingly, the approach of German legislators differed from the point of view of the other states mentioned above. The definitions of crimes in the Rome Statute did not take precedence over those already included in Germany's Criminal Code. The law only stipulates the principle of *lex specialis derogat legi generali*, which in this sense means that the prevailing norm is domestic law.⁵⁴

The act, which ratified the Statute pursuant to the Art. 59 of the German Basic Law,⁵⁵ declared the Statute an integral part of the German legislative framework and that those articles specifying the rights and duties of individuals have direct applicability. However, as a law whose status is that of an act of Parliament, many subsequent domestic laws prevail over these provisions. The duty to avoid conflict lies in the hands of the bodies applying them, that is, courts or public authorities.⁵⁶

In many contexts, Germany's implementation measures extended the jurisdiction of German courts. The Code of Crimes against International Law declared the universality principle, enabling the German courts to use decisive powers in relation to the Statute's core crimes (genocide, crimes against humanity, war crimes and crime of aggression), including situations not directly connected to the Republic. The only precondition is that the pertinent crime be a serious criminal offence, that is, carrying a sentence with a minimum of one year of imprisonment under German law. However, this means that some crimes, like failure to report a crime, do not fall within the scope of these measures.⁵⁷

53 German Implementation Act (Gesetz zur Ausführung des Römischen Statuts des Internationalen Strafgerichtshofes), 21 June 2002, 1 July 2002. German Code of Crimes against International Law (Gesetz zur Einführung des Völkerstrafgesetzbuches), n. 3150, 26 June 2002, 22 December 2016.

54 Trondle and Fischer, 2007, para 39–46.

55 German Basic Law (Grundgesetz), 23 May 1949, Art. 59, sec. 2.

56 HeS, Knust and Schuon, 2005, p. 134.

57 Neuner, 2003, p. 106.

Some of the crimes stipulated in the Rome Statute were *stricto sensu* unknown to the German legal framework before the implementation procedures. Since the legislators were aware that even without the Rome Statute the law needed to comply with customary international law, the implementation process seemed to be the perfect occasion to amend existing laws and also create new ones, in order to fill the current gaps in the criminal law. To give a specific and important example, Germany had not transformed the Geneva Conventions of 1949 and their Additional Protocols into its domestic law. Hence, with the creation of the new law the legislators were also able to satisfy the obligations stemming from the Geneva Conventions. The aim was therefore to transpose the Rome Statute into German law by way of a modified codification that would be both comprehensive and independent. The exact form was the already mentioned act entitled the Code of Crimes against International Law, which represented a perfect tool to achieve this goal.⁵⁸

The Code of Crimes against International Law implemented the crime of genocide in its first chapter, section 6, with a sanction of life imprisonment or, if certain mitigating circumstances obtain, a sentence of no less than five years. Section 7 defines crimes against humanity in a similar fashion to the Rome Statute, with a sanction of life imprisonment or, if certain mitigating circumstances obtain, a sentence of no less than three to five years.⁵⁹ The second chapter deals with war crimes, such as war crimes against persons, against property and other rights, against humanitarian operations and emblems, the use of prohibited methods of warfare or consisting employment of prohibited means of warfare. When analysing the provisions one can conclude that the act completely followed the definitions laid down in the Statute.⁶⁰

Although German law already included some provisions prohibiting the crimes set out in the Statute (for example, Germany had in 1954 ratified the Genocide Convention and transformed the international regulation into a new offence of genocide in s. 220a of the German Criminal Code), German legislators decided to implement all of the core crimes in one package, including those which were defined in the Geneva Conventions.⁶¹ In addition, the Code of Crimes includes some extra crimes, such as violation of the duty of supervision by a commander who intentionally or negligently omits supervision of a person under their effective control and when a subordinate commits an offence prohibited by the above-mentioned act. Another crime, failure to report a crime, also relates to a commander's responsibility to report a crime committed by a subordinate.⁶² Therefore, by including such measures, the German Code of Crimes demands an even higher standard than does the Rome Statute.

In a similar fashion to the approach described above, in relation to the implementation of the text setting out the means of cooperation between the ICC and the

58 Werle and Jessberger, 2002, p. 200.

59 German Code of Crimes against International Law, 2016, sec. 6–7.

60 Ibid., Sec. 8–12.

61 Gropengieser, 2005, p. 330.

62 German Code of Crimes against International Law, 2016, sec. 14–15.

German authorities, German legislators decided to create a new, self-contained Cooperation Act rather than amend the already existing legal framework. In addition, legislators had previous experience arising from their partnership with two criminal tribunals, the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda. Given that the Cooperation Act properly distinguishes between vertical and horizontal cooperation, it served later as model for other countries on how to properly introduce cooperation with the ICC into their legal systems.⁶³

Germany currently tends to apply universal jurisdiction in significant cases, mainly relating to crimes committed in the Syrian context,⁶⁴ but during the implementation procedures the German legislators went even further than necessary and established a procedure that enables the German authorities to arrest individuals for surrender even before the request for surrender has itself been formulated. This is to enable those strongly suspected of committing one of the core crimes of the Statute to be surrendered to the ICC, including cases where there is high risk that the suspect will try to obstruct the investigation.⁶⁵

When the constitutional issues regarding the immunity of high-ranking officials are taken into consideration, the German standpoint was deeply trustful. As the provision in the Rome Statute cannot affect Germany's existing obligations under international law, it implies that the ICC will examine the relevant immunities before requesting the suspect's surrender. In this regard, the question of immunity presented less of a problem than was the case in the other countries discussed here.⁶⁶

The case law in the matter developed even further, when in 2021 the Federal Court of Justice stipulated that in customary international law, officials who hold subordinate positions cannot invoke functional immunity when facing prosecution abroad for war crimes and other serious international crimes. The state always enjoys immunity for *acta iure imperii*, but the principle of sovereign immunity cannot leave violations of the *ius cogens* law unsanctioned.⁶⁷

The German legal system very rarely concedes competence in legal matters, with the strong position of the German Constitutional Court especially notable in this regard. In this context, certain landmark decisions – mainly concerning EU law – should be noted. Nevertheless, the ICC is one international institutions on which Germany has conferred some of its sovereign power, meaning that in cases of conflicting laws, the Rome Statute decides which norm takes precedence.⁶⁸ Consequently, by creating new acts, Germany improved the development of the ICC and thereby aided the application of international criminal law.

63 Wilkitzki, 2002, p. 198.

64 Voelkerrechtsblog. (n.d.). *The sadly neglected crime of aggression*.

65 Wilkitzki, 2002, p. 202.

66 HeS, Knust and Schuon, p. 159.

67 Case of n. 3 StR 564/19, 28 January 2021, para 11, 13, 17, 23, 35 and 43.

68 German International Criminal Court Act (Internationaler Strafgerichtshof-Statutgesetz), 17 July 1998, 8 December 2000.

4. Current cooperation and activities between the ICC and the Central European countries

The jurisprudence of the ICC concerning Central European countries is fortunately close to zero. However, some specific activities concerning the region can be analysed. Besides acting as a traditional court, the ICC has been concluding projects fostering cooperation, complementarity and universality between its signatory states. In Central Europe, it has conducted several missions. In Slovakia, a delegation of the Registry of the ICC met in 2019 with representatives of various Slovak ministries and discussed practical ways to enhance cooperation with the Court. The aim of the meeting was to take part in in-depth debates with regard to advancing endeavours in the field of voluntary cooperation.⁶⁹ With regard to current cooperation, the Czech Republic in 2022 handed over evidence of alleged war crimes perpetrated in Ukraine to the ICC. The prosecutor of The Hague Tribunal met the head prosecutor in Prague to discuss the investigation on the basis that the Czech National Centre against Organized Crime had provided testimonies from several dozen people, mostly refugees from Ukraine.⁷⁰ In Germany in 2013, the ICC concluded several regional cooperation seminars to foster cooperation with the Court and promote mutual understanding.⁷¹ Germany also contributed financially to the Trust Fund for Victims in 2021 to support reparative justice.⁷² In terms of Hungarian cooperation, we can mention the organising of a special side-event co-hosted by the Coalition for the ICC dealing with the question of the legal representation of victims.⁷³

The Court's effects can be seen in various interesting forms. In March 2023, a case was filed in Germany in relation to crimes committed in Myanmar before and after the coup on the basis of universal jurisdiction. The claim was brought against senior Myanmar military generals and other actors who allegedly committed genocide, war crimes, and crimes against humanity. Myanmar does not fulfil any of the conditions for the ICC's jurisdiction. However, with the adoption of the Rome Statute, several countries updated their criminal legislation and introduced the necessary legal framework to proceed with universal jurisdiction prosecutions. In Germany, the legal grounds for the Myanmar case served the already analysed German Code of Crimes against International Law, being the result of the implementation procedure. It proves that European countries have the operational scope to address impunity even in the context of armed conflicts in Africa or Asia.⁷⁴

69 International Criminal Court. (n.d.). *Cooperation*.

70 ČT24. (n.d.). 2023.

71 International Criminal Court. (n.d.). *Seminars fostering cooperation ICC-Germany*.

72 International Criminal Court. (n.d.). *Germany sends important message in support of reparative justice with EU110,000 contribution to Trust Fund*.

73 Statement by H.E. Gyula Sümeghy at the General Debate of the 12th Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court, 2012.

74 EJIL: Talk!. (n.d.). *New universal jurisdiction case filed in Germany for crimes committed in Myanmar*

The current developments in the substantive law also represent the implementation of the newer crime of aggression into the domestic legal framework. In this sense, some Central European countries have already moved further than the others. Five Central and Eastern Europe states (Croatia, the Czech Republic, Poland, Slovakia and Slovenia), have ratified the amendment regarding the crime of aggression,⁷⁵ though the legal provisions concerning the crime have been introduced in different ways in most of these countries. In the Czech Republic, Art. 405a of the Criminal Code defines aggression by direct reference to international law.⁷⁶ In the special part of the Polish Criminal Code, Art. 117(1) sets out a vague definition of aggression, as follows: ‘whoever initiates or wages a war of aggression’.⁷⁷ The Slovak legislation introduced the crime in Art. 417 under the title “Endangering Peace”, prohibiting acts endangering peaceful coexistence among nations by any act of warmongering, propagating war or supporting war propaganda.⁷⁸ The Croatian and Slovenian legislators decided to reproduce the exact definition from the Rome Statute. The Hungarian and Romanian governments decided not to ratify the crime of aggression,⁷⁹ also termed the “Kampala amendment”.⁸⁰ As Germany was also discussed above, it should be mentioned that Germany ratified the Kampala amendment in 2013 and implemented it through Art. 13 of the German Code of Crimes against International Law. The definition itself refers to acts which constitute a violation of the Charter of the United Nations. The provision also adds that only those persons in a position to effectively exercise control over or to direct the political or military action of a state can be held liable.⁸¹

5. The decline of international criminal law

*‘The nightmare was not long in coming; the euphoria of the 1990s was soon to be replaced with harsh reality’.*⁸²

before and after the coup: On complementarity, effectiveness, and new hopes for old crimes.

75 Status of the ratification and implementation of the Resolution RC/Res. 6 of the Review Conference of the Rome Statute. Information as of 29 July 2023.

76 Criminal Code of the Czech Republic. N. 40/2009, 2009, Art. 405a.

77 Criminal Code of Poland, 1997, Art. 117, sec.1.

78 Criminal Code of Slovak Republic, n. 300/2005, 2005, Art. 417.

79 Neither the Hungarian nor the Romanian Penal Code recognises the crime of aggression.

80 Bartkó and Sántha, p. 321.

81 German Code of Crimes against International Law. Federal Law Gazette I, p. 2254, 22 December 2016, 2016, Art. 13.

82 Dugard, 2016, p. 6.

The above was written by Emeritus Professor of Law of the University of Leiden and ad hoc Judge of the International Court of Justice, John Dugard, in 2016, commenting on the situation of international criminal law, the ICC and civil society.

The establishment of the ICC was a long-awaited and, at first glance, successful development for criminal justice in Europe. However, dissension regarding elements of the Rome Statute soon came to the fore. Article 27 of the Statute made it clear that heads of state and government do not enjoy immunity *ratione personae* from prosecution by the Court. Based on the evidence regarding the ratification and implementation process in the above countries, we can conclude that the most problematic provision to implement was the one concerning the immunity of high-ranking officials. This question led to the prolonged and problematic implementation process in the Czech Republic, Hungary's continuing failure to promulgate the Statute and it was intentionally avoided in Slovakia.

In a judgement of the International Court of Justice in 2002 named Arrest Warrant, the ICJ declared that the high-ranking officials mentioned as well as the foreign minister possess functional immunity throughout their mandate.⁸³ Later, in 2012, in *Germany v Italy*, the ICJ even broadened the concept of immunity, when the judgement elaborated that the same immunity is applicable with regard to civil actions brought against foreign governments for committing international crimes.⁸⁴ Furthermore, the same attitude was used by the European Court of Human Rights in its 2001 decisions in the *Al-Adsani* case⁸⁵ and the 2014 *Jones v United Kingdom* case.⁸⁶

Consequently, this immunity can protect officials from being subjected to the ICC's jurisdiction. States have generally accepted the interpretation of the majority of European courts, meaning that many states refused to incorporate Art. 27 of the Rome Statute into their national legislation. Hence, even if a person is suspected of having committed serious international crimes while holding office, the ICC cannot prosecute. Efforts to apply universal jurisdiction in cases of senior government officials in national courts have therefore regularly failed: examples include attempts to prosecute Muammar Ghaddafi,⁸⁷ Ariel Sharon⁸⁸ and Robert Mugabe.⁸⁹

Maximo Langer published a study in 2011 showing how many European countries, including France, England, Spain and Belgium, changed their legislation after the year 2000 to limit the application of universal jurisdiction in cases concerning high-ranking foreign political entities.⁹⁰ This was followed by several attempts to

83 International Court of Justice, *DRC v Belgium*. Reports 3, 2002.

84 International Court of Justice, *Germany v Italy*. Report 99, 2012.

85 International Court of Justice, *Al-Adsani v United Kingdom* 24. 123.

86 International Court of Justice, *Jones v United Kingdom*. Judgment. 14 January 2014.

87 French Cour de Cassation, *Chaddafie* case. Arrêt no. 1414, 125 ILR 245, 2001.

88 Belgian Cour de Cassation, *Re Sharon and Yaron*, 42 ILM 596, 2003.

89 U.S. District Court for the Southern District of New York, *Tachiona v Mugabe*. N. 169 F. Supp 2d 259. 2001.

90 See Langer, 2011, pp. 7–42.

empower the notion of universal jurisdiction. Belgium filed a complaint in 2003 against former President of the United States George Bush and his Vice-President Dick Cheney for acts committed during the Gulf War. The development followed the idea, and in 2009 Spain amended its legislation, attempting the prosecution of officials responsible for crimes committed in Guantanamo Bay prison.⁹¹

Although in many countries, including Central European countries, the provision regarding immunities of officials, mainly heads of state, represented or still represents the key issue, it can be stated that the fear is unfounded. First of all, the constitution of each of these countries empowers the Parliament to deprive the heads of state of their function through an impeachment procedure. Furthermore, ICJ and ECtHR case law has frequently given precedence to the principle of immunity over the right to prosecute. Despite various attempts to bring these officials in front of the ICC, they usually failed.

6. Conclusion

The focus of this study was presenting similarities and differences in the implementation procedures of the Rome Statute in various Central European countries, providing an insight into the issues raised during its ratification, implementation and promulgation. The study also described the exact provisions which implemented the four core crimes of the ICC. The implementation of an international treaty concerning international criminal law, such as the Rome Statute, is shown to be part of a broader issue linked to the relationship between international and national law, which is regulated by the constitutional laws of the contracting states. It is therefore a matter for each contracting state to regulate this question. In addition, complications arising from the specific nature of criminal law and criminal responsibility are associated with this issue.⁹²

Many Central European countries faced the issue of the collision of norms, mainly in relation to the immunity of high-ranking officials. As a result, the ratification process extended for many years in some cases, as in the Czech Republic, and in others the problem remains unresolved, as in Hungary which has still not promulgated the Statute as required for its proper application in domestic law. Although the Kampala amendment regarding the crime of aggression can be seen as problematic, all of the countries discussed here incorporated the crime of genocide, crimes against humanity and war crimes into their legislation in an appropriate fashion. The implementation of the Rome Statute in this sense meant a step forward in the story of the development of criminal justice in Central European countries.

91 Dugard, 2016, p. 8.

92 Repík, 2004, p. 29.

The fact that several large states continue to refuse to participate in the work of the Court, perhaps out of fear of their own citizens being prosecuted, is widely contested by critics. These are economically and militarily important states that often participate in foreign missions or have long-term disputes over sovereign territory with separatists, that is, states where the probability of serious crimes being committed is relatively high. While these citizens would escape the Court's jurisdiction, soldiers who are citizens of Central European countries and participate in missions under a foreign flag are at risk of possible prosecution.

The non-participation of the great powers raises doubts about the meaningfulness of the ICC. In cases involving these states, the Court will not be able to fairly punish their citizens and can only exercise its powers to the detriment of smaller, politically less influential states, which join common projects in an attempt to gain more influence on the international scene. The scepticism stemming from the belief that without the support of the great powers the ICC is powerless is also understandable.⁹³

Despite the criticisms, the Court is undoubtedly of importance in the Central European region, including in terms of its preventive influence. The determination not to let the perpetrators of crimes escape and the awareness of perpetrators that they will not find shelter in the territory of another state and will not avoid punishment certainly has such a result. In addition, there is the harmonising effect of incorporating common criminal legislation, which upholds the principle of the 'same conduct same person' test.⁹⁴

We can see that, with time, it is becoming accepted that high-ranking political and military leaders who commit serious crimes against the populations of their own countries should be brought before domestic criminal courts or the ICC. Today, in most countries of the world, it is taken for granted that the ability of political and military leaders to act with impunity must be ended.⁹⁵ In this sense, the implementation and, if necessary, application of the Statute has definitely a place and time in Central European countries.

93 Bílková, 2008, p. 11.

94 Oikya, 2022, p. 53.

95 Farkas, 2010, pp. 32–33.

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