Chapter 4

The Interplay Between the ICC and Other International Courts and Tribunals: From the Nuremberg Principles to the Latest ICJ Case Law

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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 asspect, 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

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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 IL 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 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 1949[13] 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 1996[16] 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 Cassesse, 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 levelng. 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 not 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 courts[100] 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, Kolk 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.

References

Akande, D., & Shah, S. (2011). Immunities of state officials, international crimes and foreign domestic courts: A rejoinder to Alexander Orakhelashvili. *European Journal of International Law, 22*(3), 915–930. https://doi.org/10.1093/ejil/chr058

Bitti, G. (2009). Article 21 of the Statute of the International Criminal Court and the treatment of sources of law in the jurisprudence of the ICC. In C. Stahn & G. Sluiter (Eds.), *The emerging practice of the International Criminal Court.* Brill | Nijhoff.

Brownlie, I. (2008). *Principles of public international law* (7th ed.). Oxford University Press.

Cassese, A. (2008). *International criminal law* (2nd ed.). Oxford University Press.

Charter of the International Military Tribunal. (1945, August 8). [Online] Available at: from http://www.legal-tools.org/doc/64ffdd/ (Accessed November 22, 2023)

Ciorciari, J. D., & Heindel, A. (2016). Victim testimony in international and hybrid criminal courts: Narrative opportunities, challenges, and fair trial demands. *Virginia Journal of International Law, 56*(2), 295–353.

Cryer, R., Friman, H., Robinson, D., & Wilmshurst, E. (2010). *An introduction to international criminal law and procedure* (2nd ed.). Cambridge University Press.

Gaeta, P. (1999). The defence of superior orders: The Statute of the International Criminal Court versus customary international law. *European Journal of International Law, 10*(1), 172–191.

International Military Tribunal (Nuremberg). (1946, October 1). *The United States of America, the French Republic, the United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics v. Göring et al., Judgment* (Nuremberg Judgment), para. 447. [Online] Available at: http://www.legal-tools.org/doc/45f18e/ (Accessed November 22, 2023)

Jackson, R. H. (n.d.). Opening statement before the International Military Tribunal. [Online] Available at: https://www.roberthjackson.org/speech-and-writing/opening-statement-before-the-international-military-tribunal/ (Accessed November 22, 2023)

Kelsen, H. (1947). Will the judgment in the Nuremberg trial constitute a precedent in international law? *International Law Quarterly, 1*(2), 153–171.

Kelsen, H. (2007). *General theory of law and state* (A. Wedberg, Trans.). The Lawbook Exchange. (Original work published 1945)

King, H. T. (2007). Without Nuremberg – what? *Washington University Global Studies Law Review, 6*(3), 625–636.

Kirsch, P. (2007). Applying the principles of Nuremberg in the International Criminal Court. *Washington University Global Studies Law Review, 6*(3), 501–505.

Kress, C. (2018). On the activation of ICC jurisdiction over the crime of aggression. *Journal of International Criminal Justice, 16*(1), 1–17. https://doi.org/10.1093/jicj/mqy004

Krisch, N. (2012). Article 41. In B. Simma (Ed.), *The Charter of the United Nations: A commentary* (3rd ed.). Oxford University Press.

Krivokapić, B. (2017). On the issue of so-called "instant" customs in international law. *Acta Universitatis Danubius: Relationes Internationales, 9*(2), 68–82.

La Haye, E. (2008). *War crimes in internal armed conflicts*. Cambridge University Press.

Lipovský, M. (2021). Norimberské principy a jejich dopady v současnosti. In A. Gerloch & K. Žák Krzyžanková (Eds.), *Právo v měnícím se světě.* Aleš Čeněk.

Meron, T. (2000). The Martens Clause, principles of humanity, and dictates of public conscience. *American Journal of International Law, 94*(1), 78–89. https://doi.org/10.2307/2555236

Ohlin, J. D. (2014, July 23). Control matters. Opinio Juris. [Online] Available at: https://opiniojuris.org/2014/07/23/control-matters-ukraine-russia-downing-flight-17/ (Accessed November 22, 2023)

Schabas, W. A. (2010). *The International Criminal Court: A commentary on the Rome Statute*. Oxford University Press.

Schabas, W. A. (2011). *An introduction to the International Criminal Court* (4th ed.). Cambridge University Press.

Scharf, M. P. (2014). Accelerated formation of customary international law in time of fundamental change. *ILSA Journal of International & Comparative Law, 20*(2), 305–321.

Stahn, C., & Sluiter, G. (Eds.). (2009). *The emerging practice of the International Criminal Court*. Brill | Nijhoff.

Šturma, P., Chovancová, K., Šmigová, K., & Větrovský, J. (2017). *Immunities of states and their officials in contemporary international law.* rw&w Science & New Media.

Thirlway, H. (2006). The sources of international law. In M. D. Evans (Ed.), *International law* (2nd ed., pp. xxx–xxx). Oxford University Press.

Tomuschat, C. (2006). The legacy of Nuremberg. *Journal of International Criminal Justice, 4*(4), 830–844.

Van Sliedregt, E. (2012). *Individual criminal responsibility in international law.* Oxford University Press.

Werle, G., & Jessberger, F. (2014). *Principles of international criminal law* (3rd ed.). Oxford University Press.

Whiting, A. (2011). The ICTY as a laboratory of international criminal procedure. In B. Swan, A. Zahar, & G. Sluiter (Eds.), *The legacy of the International Criminal Tribunal for the Former Yugoslavia*. Oxford University Press.

Yang, X. (2012). *State immunity in international law.* Cambridge University Press.